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No. 2382

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CANTON INSURANCE OFFICE, LIMITED, a corporation,

THE YANG-TSZE INSURANCE ASSOCIATION, a corporation, Appellants,

vs.

INDEPENDENT TRANSPORTATION COMPANY, a corporation,

THE CHINA TRADERS INSURANCE COMPANY, a corporation, Appellees.

APOSTLES ON APPEAL

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Reports of U.S. Circuit
Court of Appeals
F64

No._____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CANTON INSURANCE OFFICE, LIMITED, a corporation,

THE YANG-TSZE INSURANCE ASSOCIATION, a corporation, Appellants,

vs.

INDEPENDANT TRANSPORTATION COMPANY, a corporation,

THE CHINA TRADERS INSURANCE COMPANY, a corporation, Appellees.

APOSTLES ON APPEAL

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

NAMES AND ADDRESSES OF COUNSEL

IRA D. CAMPBELL,
Merchants Exchange Building, San Francisco, California

JAMES A. KERR,
1309 Hoge Building, Seattle, Washington,

E. S. McCORD,
1309 Hoge Building, Seattle, Washington,
Proctors for Libellant and Appellee, Independent Transportation Company.

WILLIAM H. GORHAM,
653 Colman Building, Seattle, Washington,
Proctor for Respondents and Appellants Yang-Tsze Insurance Association, Limited.
Canton Insurance Office, Limited.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CANTON INSURANCE OFFICE, LIMITED, ET AL, Appellants,

vs.

INDEPENDANT TRANSPORTATION COMPANY ET AL, Appellees.

Stipulation with Reference to Printed Record and Sending Up Original Exhibits as Supplemental Record.

It is hereby stipulated by and between the parties hereto that there shall not be printed in the Record on appeal herein any of the Exhibits referred to in the Exceptions to the third amended libels or introduced in evidence, and filed in said causes, in the United States District Court for the Western District of Washington, Northern Division; and that all of the original of said Exhibits, except as otherwise stipulated by the parties hereto, shall be transmitted to the above entitled court, under the certificate of the Clerk of said District Court and seal thereof, as a supplemental Record herein.

Dated Seattle, Washington, January 12th, 1914.

WILLIAM H. GORHAM,
Proctor for Appellants,

IRA D. CAMPBELL,
KERR & McCORD,
Proctors for Appellees,
Independent Transportation Company.

(Endorsed): Filed in the U. S. District Court Western Dist. of Washington Northern Division Jan. 12 1914 Frank L. Crosby, Clerk By.....Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3849

CANTON INSURANCE OFFICE, LIMITED, ET AL, Appellants,

vs.

INDEPENDANT TRANSPORTATION COMPANY, ET AL, Appellees.

Order for Sending up Original Exhibits as Supplemental Record.

Agreeable to the written stipulation of the parties hereto this day filed herein, and, it being, in the opinion of the undersigned the Judge who signed the Citation on appeal herein, proper,

It is now here ordered by the undersigned, the Judge who signed the Citation on appeal herein that the Clerk of the United States District Court for the Western District of Washington, Northern Division, transmit under his certificate and the seal of said District Court, all of the original exhibits referred to in the exceptions to the third amended libels, or offered in evidence, and filed in said cause in said District Court, except as may by stipulation be otherwise provided, as a supplemental Record herein.

Dated Seattle, Washington, January 12th, 1914.

JEREMIAH NETERER,
United States District Court for Western District of Washington.

(Endorsed): Filed in the U. S. District Court Western Dist. of Washington, Northern Division, Jan. 12 1914 Frank L. Crosby, Clerk. By ..... Deputy.

STATEMENT.

Time of Commencement of Suit: December 14, 1908.

Names of Parties to Suit:: Cause No. 3848: Libellant, Independent Transportation Company, a corporation; Respondent, The Yang-Tsze Insurance Association, Limited, corporation;

Cause No. 3849: Libellant, Independent Transportation Company, a corporation; Respondent, Canton Insurance Office, Limited, a corporation.

Consolidation of Causes: Stipulation as to consolidating causes, filed January 4, 1909. Order consolidating causes made and entered January 4, 1909.

Dates for Filing Respective Pleadings:

Third Amended Libels filed April 22, 1910.

Exceptions to Third Amended Libels filed March 28, 1910.

Answers to Third Amended Libels filed March 30, 1910.

Issuance of Process and Service thereof: On December 14, 1908, issued Citation in causes Nos. 3848, 3849, and delivered same to Marshal for service.

On December 14, 1908, the Marshal returned the same into the Clerk's office with return endorsed thereon showing service thereof on respondents on December 14, 1908.

Reference to Commissioner: Consolidated causes under No. 3849 were referred to Commissioner to take and report the testimony on April 18, 1910, and said Commissioner, on November 8, 1912, duly returned into the Clerk's office his transcript of the testimony so taken together with the Exhibits offered in evidence before said Commissioner, which said testimony and exhibits were duly filed in said cause on the 8th day of November, 1912.

Depositions: The depositions of Louis Rosenthal et al and of W. H. Le Boyteaux et al were taken by stipulation, returned and filed in the Clerk's office and thereafter published by order of Court of date March 15, 1911.

Time of Trial: The consolidated causes came on for trial on issues of law, towit, on exceptions to third amended libels before the Hon. C. H. Hanford, District Judge, on March 28, 1910; and for final hearing on the merits, causes submitted without argument upon written briefs of respective parties before Hon. Jeremiah Neterer, District Judge, on October 13, 1913.

Final Decree: December 15, 1913.

Notice of Appeal: December 30, 1913.

In the United States District Court, for the Western District of Washington, Northern Division.

No. 3848

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LTD., Respondent,

No. 3849

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CANTON INSURANCE OFFICE, LTD., Respondent,

No. 3858

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CHINA TRADERS INSURANCE COMPANY, Respondent.

STIPULATION

It is hereby stipulated by and between the parties to the above entitled causes that an order may be entered by the above entitled Court, consolidating said causes for the purpose of trial, but nothing herein shall be construed as admitting any liability on the part of any one of said respondents for either or both of the other respondents above named.

And it is further stipulated that upon final determination of said causes on the merits by the court, separate decrees may be entered in each of said causes, if so desired by any of the parties to this stipulation.

Dated Seattle, December 31st, 1908.

IRA A. CAMPBELL,
Proctor for Libellant in each cause.

WILLIAM H. GORHAM,
Proctor for each of the above named Respondents.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Jan. 4, 1909. R. W. Hopkins, Clerk. A. N. Moore, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

No. 3848

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LTD., Respondent,

No. 3849

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CANTON INSURANCE OFFICE, LTD., Respondent,

No. 3858

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CHINA TRADERS INSURANCE COMPANY, Respondent.

ORDER.

Upon the Stipulation heretofore filed by the parties to the above entitled causes, it is ordered that said causes be consolidated under cause No. 3849, for the purposes of trial thereof.

Dated Seattle, Jany. 4, 1909.

C. H. HANFORD,
Judge.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Jan. 4, 1909. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

In the United States District Court for the Western District of Washington, Northern Division. In Admirality.

Consolidated Case No. 3849

No. 3848. Third Amended Libel in Personam

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LIMITED, a corporation, Respondent.

To the Hon. C. H. Hanford, Judge of the above entitled Court::

The libel of the Independent Transportation Company, a corporation, libellant, against The Yang-Tsze Insurance Association, Limited, a corporation, respondent, in a cause of contract, civil and maritime, alleges as follows:

I.

That libellant, the Independent Transportation Company, is a corporation organized and existing under and by virtue of the laws of the State of Washington, and having its principal place of business at Seattle, Washington.

II.

That libellant believes and therefore alleges, respondent, The Yang-Tsze Insurance Association, Limited, to be a corporation, and maintaining an agent within the jurisdiction of this Court, but the country under the laws of which said corporation is organized is unknown to libellant, and it therefore demands strict proof of the same.

III.

That libellant was, during all times herein mentioned, and particularly from prior to July 3rd, 1907, to about August 13th, 1908, both inclusive, the sole owner of the Steamer "Vashon", an American vessel of 244 gross tons register, official number 126766.

IV.

That for and in consideration of the payment of the sum of One Hundred and Sixty-five Dollars ($165.00), by libel-

lant unto respondent, respondent insured, by its policy of insurance No. 7/349, Three Thousand Dollars ($3,000.00) on account of libellant from the 3rd day of July, 1907, until the 3rd day of July, 1908, upon its interest as owner in the body, machinery, tackle, apparel and other furniture of said Steamer "Vashon", against the adventures and perils of the seas, fires, pirates, assailing thieves, jettisons, barratry of the mariners (but not of the master), embezzlement and illicit trade, or any trade in articles contraband of war excepted in all cases; and all other losses and misfortunes that shall come to the hurt or damage of the vessel insured, or any part thereof, to which insurers are liable by the Rules and Customs of Insurance in San Francisco, including the Rules for adjustment of losses printed on the back of respondent's policy of insurance and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by said policy.

Said policy further provided: "In case of any loss or misfortune resulting from any peril insured against, the party insured hereby engages for himself or themselves, him or their factors, servants or assigns, to sue, labor and travel, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured, or any part thereof, * * * , to the charges whereof this company will contribute in proportion as the sum insured is to the whole sum at risk; nor shall the acts of the insured or insurers in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of abandonment."

V.

That, thereafter, while properly and securely moored on the evening of the 15th day of December, 1908, said Steamer "Vashon" sunk and by reason thereoef became damaged, and libellant, as owner of said steamer, suffered losses and incurred expenses in laboring to save and preserve said steamer, as hereinafter set forth.

VI.

That immediately after said steamer sunk, operations were commenced to save and preserve the same, and she was on the 11th day of January, 1908, floated and moored; that upon the raising of said steamer, she was found by the surveyors to be in such a filthy condition with fuel oil

and mud that it was impossible to ascertain the extent of damage, and they, therefore, recommended that said steamer be hauled out of the water, strakes of planking cut from her bottom and all dirt washed out, in order that a survey in detail might be made.

That pursuant to such recommendations, said steamer was, as soon as possible, on the 12th day of February, 1908, hauled out and was thereafter, with all due diligence opened up and cleaned for the purpose of making a detailed survey of said damage and of securing an estimated cost of repairs, which survey was, with all due diligence, completed by Messrs Frank Walker and Capt. S. B. Gibbs, surveyor of respondent Insurance Company, on the 15th day of April, 1908, and the estimated cost of repairs obtained.

VII.

That libellant, on April 20th, 1908, by it's agents Johnson & Higgins, served upon respondent due and regular proofs of said loss, as in such cases required, and thereafter, on April 28th, 1908, respondent advised libellant, through the latter's aforesaid agents, that respondent denied all liability under it's aforesaid policy.

VIII.

That, thereafter, libellant, ascertaining t hat said steamer would not be worth repairing and was continually deteriorating, and deeming that the sale of said steamer would be for the best interests of all concerned, and would be what a prudent uninsured owner would do, requested respondent's consent to such sale, and in reply thereto, respondent advised libellant through the latter's aforesaid agents, that it, respondent, did not have any interest in said steamer and nothing whatever to say in response to said request; and, thereupon, on or about the 13th day of August, 1908, libellant sold said steamer for the best and highest price obtainable therefor, to-wit: the sum of Seven Hundred and Fifty Dollars ($750.00).

IX.

That the sound value of said steamer at the time of said loss was the sum of $15,000.00, and in her damaged condition the sum of $750.00, and the depreciation in value of said vessel and loss to libellant, by reason of the damag-

ing of said vessel, was the sum of $14,250.00; that respondent's proportion of said loss for which it is liable under its aforesaid policy upon the basis of a partial loss is the sum of $2,850.00.

X.

That libellant incurred in laboring to save and preserve said steamer by way of salvage charges and costs and the cost of making an adjustment of said loss, the sum of $4,230.60, of which respondent is liable to pay unto libellant under it's policy the sum of $846.12.

XI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that a citation in the due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against said respondent and it be cited to appear and answer upon oath all and singular the matters so articulately propounded; and that this Honorable Court may be pleased to decree the payment of the amount due, with interests and costs; and that libellant may have such other and further relief as in law and justice it is entitled to receive.

INDEPENDENT TRANSPORTATION COMPANY,

By A. B. Shay, Sec'y.

IRA A. CAMPBELL,
KERR & McCORD,
Proctor for Libellant.

United States of America, State of Washington, County of King.—ss.

A. B. Shay, being first duly sworn, on oath, deposes and says: That he is the secretary of the Independent Transportation Company, a corporation, and as such secretary is authorized to make this verification for and on behalf of said corporation, and does make this verification in that behalf; that he has read the foregoing Third Amended

Libel, knows the contents thereof, and believes the same to be true.

A. B. SHAY.

Subscribed and sworn to before me, this 24th day of March, 1910.

(N. S.) IRA A. CAMPBELL,
Notary Public in and for the State of Washington, residing at Seattle, Wash.

(Endorsed): Filed in the U. S. District Court Western Dist. of Washington April 22 1910 R. M. Hopkins Clerk.

In the United States District Court for the Western District of Washington, Northern Division In Admiralty.

Consolidated Case No. 3849—No. 3848

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LIMITED, a corporation, Respondent.

ANSWER.

To the Honorable C. H. Hanford, Judge of the above entitled Court:

The Answer of The Yang-Tsze Insurance Association, Limited, a corporation, to the third amended libel of the Independent Transportation Company, in a cause of contract, civil and maritime, alleges as follows:

I.

It admits the allegations of the first article thereof.

II.

It admits the allegations of the second article thereof.

III.

It denies each and every allegation contained in the third article thereof, excepting the allegation that said steamer "Vashon" was an American vessel of 244 gross tons registered, official number 126766, which it admits.

IV.

It admits the allegations of the fourth article thereof.

V.

It admits that the said steamer "Vashon" sunk and by reason thereoef became damaged as alleged in the fifth article thereof, and it denies each and every other allegation of said fifth article.

VI.

Answering the sixth article thereof, it denies that any surveyor of this respondent made any finding as to the condition of said steamer "Vashon"; it denies that any surveyor of this respondent made any recommendation as to said steamer; it denies that any survey of said steamer was made or completed by any surveyor of this respondent; it denies that any estimated cost of repairs was obtained by any surveyor of this respondent; all as therein alleged; and it denies any knowledge or information sufficient to form a belief as to each and every other allegation of said sixth article, and therefore denies the same, excepting the allegation that said steamer was, on or about January 11, 1908, floated, and on or about February 12, 1908, hauled out, which it admits.

VII.

It admits that this respondent, on or about the 28th of April, 1908, denied all liability under its aforesaid policy, but it denies each and every other allegation of the seventh article thereof.

VIII.

It admits that libellant requested this respondent's consent to a sale of said steamer, and in reply thereto respondent advised libellant, through the latter's aforesaid agents, that it, respondent, did not have any interest in said steamer and nothing whatever to say in response to said request, but it denies any knowledge or information sufficient to form a belief as to each and every other allegation of the eighth article thereof, and therefore denies the same.

IX.

It denies each and every allegation contained in the ninth article thereof, and denies that respondent is liable under its aforesaid policy, upon a basis of a partial loss, in the sum of $2850.00, or in any sum whatever.

X.

It denies any knowledge or information sufficient to form a belief as to the allegations of the tenth article thereof (except as to those allegations in this tenth article denied), and therefore denies the same; and it denies that this respondent is liable to pay libellant under its policy the sum of $846.12, or any sum whatever, by way of salvage charges and costs and the cost of making an adjustment of said loss, or at all.

And this respondent further answering said third amended libel, alleges:

XI.

That it is a corporation organized and existing under the laws of Hong Kong, a Crown Colony of the British Empire.

XII.

That on or about the 16th day of July 1907, this respondent issued to libellant its policy of insurance, No. 7/349, whereby, among other things, it insured three thousand dollars on account of libellant in case of loss, to be paid to libellant from the 3rd day of July 1907, at noon, San Francisco mean time, until the 3rd day of July 1908, at noon, San Francisco mean time, upon libellant's interest as owner in the body, machinery, tackle, apparel and other furniture of the steamer "Vashon", vessel valued at $15,000, under the agreements and stipulations therein contained, as will more fully appear by reference to said policy, a copy of which has heretofore been filed herein, marked Exhibit No. 1, and is hereby referred to and by such reference made a part hereof; and whereby libellant, among other things, expressly warranted to respondent that, during the term of said policy, the said vessel would be and remain employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle.

XIII.

That on or about December 3, 1907, in violation of said express warranties of libellant, said steamer was by libellant removed from a dock in Seattle harbor, on Puget Sound, and towed to a point in the Duwamish River, in King County, State of Washington, and there moored to piling, laid up for the winter, out of commission, her master and crew discharged, and her care and safety entrusted to a river

boat houseman, living on the bank of the Duwamish River adjacent to where said steamer was so moored; and that thereafter, on or about December 15, 1907, and while said vessel was moored in said Duwamish River, laid up for the winter, out of commission, her master and crew discharged, and her care and safety entrusted to said river boat houseman, as aforesaid, said vessel filled with water and sank.

XIV.

That this respondent has no knowledge or information as to the extent of damages sustained by said steamer by reason of her sinking as aforesaid, and therefore demands proof of the same if material.

That all and singular the premises are true.

Wherefore, respondent prays that this Honorable Court would be pleased to pronounce against the third amended libel aforesaid, and to condemn libellant in costs and otherwise right and justice to administer in the premises.

YANG-TSZE INSURANCE ASSOCIATION, Ltd.,
Respondent.

WILLIAM H. GORHAM,
Proctor for Respondent.

United States of America, Western District of Washington, —ss.

E. H. Hutchinson being first duly sworn, on oath says: That he is agent for respondent in the above entitled action; that he has heard the foregoing answer read, knows the contents thereof, and believes the same to be true.

E. H. HUTCHINSON.

Subscribed and sworn to before me this 29th day of March, A. D. 1910.

S. H. KELLERAN,

Notary Public in and for the State of Washington, residing at Seattle, Wash.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington Mar 30, 1910 R M Hopkins, Clerk.

In the United States District Court for the Western District of Washington, Northern Division. In Admiralty.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CANTON INSURANCE OFFICE, LIMITED, a corporation, Respondent.

Consolidated Case No. 3849.

No. 3849. Third Amended Libel in Personam.

To the Hon. C. H. Hanford, Judge of the above-entitled court:

The libel of the Independent Transportation Company, a corporation, libellant, against the Canton Insurance Office, Limited, a corporation, respondent, in a cause of contract, civil and maritime, alleges as follows:

I.

That libellant, the Independent Transportation Company, is a corporation organized and existing under and by virtue of the laws of the State of Washington, and having its principal place of business at Seattle, Washington.

II.

That libellant believes and therefore alleges, respondent, Canton Insurance Office, Limited, to be a corporation, and maintaining an agent within the jurisdiction of this court, but the country under the laws of which said corporation is organized is unknown to libellant, and it therefore demands strict proof of the same.

III.

That libellant was, during all times herein mentioned, and particularly from prior to July 3rd, 1907, to about August 13th, 1908, both inclusive, the sole owner of the Steamer "Vashon," an American vessel of 244 gross tons register, official number 126766.

IV.

That for and in consideration of the payment of the sum of Two Hundred and Twenty Dollars ($220.00), by

libellant unto respondent, respondent insured, by its policy of insurance No. 117/10134, Four Thousand Dollars, ($4,000.00) on account of libellant from the 3rd day of July, 1907, until the 3rd day of July, 1908, upon its interest as owner in the body, machinery, tackle, apparel and other furniture of said Steamer "Vashon," against the adventures and perils of the seas, fires, pirates, assailing thieves, jettisons, barratry of the marines (but not of the master), embezzlement and illicit trade, or any trade in articles contraband of war excepted in all cases; and all other losses and misfortunes that shall come to the hurt or damage of the vessel insured, or any part thereof, to which insurers are liable by the Rules and Customs of Insurance in San Francisco, including the Rules and adjustment of losses printed on the back of respondent's policy of insurance and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by said policy.

Said policy further provided: "In case of any loss or misfortune resulting from any peril insured against, the party insured hereby engages for himself or themselves, his or their factors, servants or assigns, to sue, labor and travel, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured, or any part thereof, * * *, to the charges whereof this company will contribute in proportion as the sum insured is to the whole sum at risk; nor shall the acts of the insured or insurers in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver of an acceptance of abandonment."

V.

That, thereafter, while properly and securely moored on the evening of the 15th day of December, 1908, said Steamer "Vashon" sunk and by reason thereof became damaged, and libellant, as owner of said steamer, suffered losses and incurred expenses in laboring to save and preserve said steamer, as hereinafter set forth.

VI.

That immediately after said steamer sunk, operations were commenced to save and preserve the same, and she was on the 11th day of January, 1908, floated and moored; that upon the raising of said steamer, she was found by

the surveyors to be in such a filthy condition with fule oil and mud that it was impossible to ascertain the extent of damages, and they, therefore, recommended that said steamer be hauled out of the water, strakes of planking cut from her bottom and all dirt washed out, in order that a survey in detail might be made.

That pursuant to such recommendations, said steamer was, as soon as possible, on the 12th day of February, 1908, hauled out and was thereafter, with all due diligence opened up and cleaned for the purpose of making a detailed survey of said damage and of securing an estimated cost of repairs, which survey was, with all due diligence, completed by Messrs. Frank Walker and Capt. S. B. Gibbs, surveyor of respondent Insurance Company, on the 15th day of April, 1908, and the estimated cost of repairs obtained.

VII.

That libellant, on April 20th, 1908, by its agents Johnson & Higgins, served upon respondent due and regular proofs of said loss, as in such cases required, and thereafter, on April 25th, 1908, respondent advised libellant, through the latter's aforesaid agents, that respondent denied all liability under it's aforesaid policy.

VIII.

That, thereafter, libellant, ascertaining that said steamer would not be worth repairing and was continually deteriorating, and deeming that the sale of said steamer would be for the best interests of all concerned, and what a prudent uninsured owner would do, requested respondent's consent to such sale, and in reply thereto, respondent advised libellant through the latter's aforesaid agents, that it, respondent, did not have any interest in said steamer and nothing whatever to say in response to said request; and, thereupon, on or about the 13th day of August, 1908, libellant sold said steamer for the best and highest price obtainable therefor, to-wit: the sum of Seven Hundred and Fifty Dollars ($750.00).

IX.

That the sound value of said steamer at the time of said loss was the sum of Fifteen Thousand Dollars ($15,000.00), and in her damaged condition the sum of Seven Hundred and Fifty Dollars ($750.00), and the depreciation in value

of said vessel and loss to libellant, by reason of the damaging of said vessel was the sum of Fourteen Thousand Two Hundred and Fifty Dollars ($14,250.00); that respondent's proportion of said loss for which it is liable under it's aforesaid policy upon the basis of a partial loss is the sum of Three Thousand Eight Hundred Dollars ($3,800.00).

X.

That libellant incurred in laboring to save and preserve said steamer by way of salvage charges and costs and the cost of making an adjustment of said loss, the sum of Four Thousand Two Hundred Thirty and 60/100 Dollars ($4,230.60), of which respondent is liable to pay unto libellant under it's policy the sum of One Thousand One Hundred Twenty-eight and 16/100 Dollars ($1,128.16).

XI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libellant prays that a citation in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said respondent and it be cited to appear and answer upon oath all and singular the matters so articulately propounded; and that this Honorable Court may be pleased to decree the payment of the amount due, with interest and costs; and that libellant may have such other and further relief as in law and justice it is entitled to receive.

INDEPENDENT TRANSPORTATION COMPANY,
By A. B. Shay, Sec'y.

IRA A. CAMPBELL,
KERR & McCORD,
Proctors for Libellant.

United States of America, State of Washington, County of King.—ss.

A. B. Shay, being first duly sworn, on oath, deposes and says: That he is the Secretary of the Indepedent Transportation Company, a corporation, and as such Secretary is authorized to make this verification for and on behalf of said

corporation, and does make this verification in that behalf; that he has read the foregoing Third Amended Libel, knows the contents thereof, and believes the same to be true.

A. B. SHAY.

Subscribed and sworn to before me this 24th day of March, 1910.

(N. S.) IRA A CAMPBELL,
Notary Public in and for the State of Washington, residing at Seattle, Wash.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Apr. 22, 1910. R. M. Hopkins, Clerk.

In the United States District Court for the Western District of Washington, Northern Division. In Admiralty.

Consolidated Case No. 3849.

No. 3849. Answer.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CANTON INSURANCE OFFICE, LIMITED, a corporation, Respondent.

To the Honorable C. H| Hanford, Judge of the above entitled Court:

The Answer of the Canton Insurance Office, Limited, a corporation, to the third amended libel of the Independent Transportation Company, in a cause of contract, civil and maritime, alleges as follows:

I.

It admits the allegations of the first article thereof.

II.

It admits the allegations of the second article thereof.

III.

It denies each and every allegation contained in the third article thereof, excepting the allegation that said

steamer "Vashon" was an American vessel of 244 gross tons registered, official number 126766, which it admits.

IV.

It admits the allegations of the fourth article thereof.

V.

It admits that the said steamer "Vashon" sunk and by reason thereof became damaged as alleged in the fifth article thereof, and it denies each and every other allegation of said fifth article.

VI.

Answering the sixth article thereof, it denies that any surveyor of this respondent made any finding as to the condition of said steamer "Vashon;" it denies that any surveyor of this respondent made any recommendation as to said steamer; it denies that any survey of said steamer was made or completed by any surveyor of this respondent; it denies that any estimated cost of repairs was obtained by any surveyor of this respondent; all as therein alleged; and it denies any knowledge or information sufficient to form a belief as to each and every other allegation of said sixth article, and therefore denies the same, excepting the allegations that said steamer was, on or about January, 11, 1908, floated, and on or about February 12, 1908, hauled out, which its admits.

VII.

It admits that this respondent, on or about the 28th of April, 1908, denied all liability under its aforesaid policy, but it denies each and every other allegation of the seventh article thereof.

VIII.

It admits that libellant requested this respondent's consent to a sale of said steamer, and in reply thereto respondent advised libellant, through the latter's aforesaid agents, that it, respondent, did not have any interest in said steamer and nothing whatever to say in response to said request, but it denies any knowledge or information sufficient to form a belief as to each and every other allegation of the eighth article thereof, and therefore denies the same.

IX.

It denies each and every allegation contained in the ninth article thereof, and denies that respondent is liable under its aforesaid policy, upon a basis of a partial loss in the sum of $3800.00, or in any sum whatever.

X.

It denies any knowledge or information sufficient to form a belief as to the allegations of the tenth article thereof (except as to those allegations in this tenth article denied), and therefore denies the same; and it denies that this respondent is liable to pay libellant under its policy the sum of $1128.16, or any sum whatever, by way of salvage charges and costs and cost of making an adjustment of said loss, or at all.

And this respondent further answering said third amended libel, alleges:

XI.

That it is a corporation organized and existing under the laws of Hong Kong, a Crown Colony of the British Empire.

XII.

That on the 3rd day of July 1907, this respondent issued to libellant its policy of insurance, No. 117/10134, whereby among other things, it insured four thousand dollars on account of libellant in case of loss, to be paid to libellant from the 3rd day of July 1907, at noon, San Francisco mean time, until the 3rd day of July, 1908, at noon San Francisco mean time, upon libellant's interest as owner in the body, machinery, tackle, apparel and other furniture of the steamer "Vashon," vessel valued at $15,000 under the agreements and stipulations therein contained, as will more fully appear by reference to said policy, a copy of which has heretofore been filed herein, marked Exhibit No. 1, and is hereby referred to and by such reference made a part hereof; and whereby libellant, among other things, expressly warranted to respondent that, during the term of said policy, the said vessel would be and remain employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle.

XIII.

That on or about December 3, 1907, in violation of said express warranties of libellant, said steamer was by

libellant removed from a dock in Seattle harbor, on Puget Sound, and towed to a point in the Duwamish River, in King County, State of Washington, and there moored to piling, laid up for the winter, out of commission, her master and crew discharged, and her care and safety entrusted to a river boat houseman, living on the bank of the Duwamish River adjacent to where said steamer was so moored; and that thereafter, on or about December 15, 1907, and while said vessel was moored in said Duwamish River, laid up for the winter, out of commission, her master and crew discharged, and her care and safety entrusted to said river boat houseman, as aforesaid, said vessel filled with water and sank.

XIV.

That this respondent has no knowledge or information as to the extent of damages sustained by said steamer by reason of her sinking as aforesaid, and therefore demands proof of the same if material.

That all and singular the premises are true.

Wherefore, respondent prays that this Honorable Court would be pleased to pronounce against the third amended libel aforesaid, and to condemn libellant in costs and otherwise right and justice to administer in the premises.

CANTON INSURANCE OFFICE, Limited.
Respondent.

WILLIAM H. GORHAM,
Proctor for Respondent.

United States of America, Western District of Washington. —ss.

J. R. Mason, being first duly sworn, on oath says: That he is agent for respondent in the above entitled action; that he has heard the foregoing answer read, knows the contents thereof, and believes the sam to be true.

J. R. MASON.

Subscribd and sworn to before me this 29th day of March, A. D. 1910.

EARL E. RICHARDS,
Notary Public in and for the State of Washington, residing at Seattle, Wash.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Mar. 30, 1910. R. M. Hopkins, Clerk.

United States District Court, Western District of Washington, Northern Division.

No. 3849. Filed Oct. 16, 1910.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libelant,

vs.

CANTON INSURANCE OFFICE, LIMITED, a corporation, Respondent.

Memorandum Decision on Exceptions and Exceptive Allegations to the Several Libels as Amended.

These several suits are founded upon policies insuring the steamer Vashon. The policies were issued at Seattle, they contain the usual restrictions in the San Francisco form of marine policies, and the following special warranty clause:

"Vessel warranted employed in the general passenger and freighting business on Puget Sound within a radius of 30 miles from Seattle, Warranted no lime under deck."

The first exception is on the ground of alleged insufficiency of the libels in the failure to allege compliance on the part of the insured with the requirements of express warranties in the policies, the contention being that the libelant should assume the burden of alleging and proving that there was no breach of the warranties. This is contrary to the fundamental principle that courts do not presume that a contract has been broken, nor require a litigant to prove a negative. Therefore, notwithstanding the authorities the Court holds that a breach of warranty should be pleaded as a special defense in order to present that issue in the best form for adjudication.

The first exception is over-ruled.

The respondents have introduced and made part of the record in the case, the notice of abandonment of the vessel and proof of loss whereby it appears that the Vashon at the time of the disaster which occasioned the loss, was out of commission and moored in the Duwamish River, and it is contended that as she was not then employed in the general passenger and freighting business on Puget Sound, there was a breach of the special warranty which avoided

liability under the terms of the policies. The respondents contend for the principle that insurers are entitled to insist upon strict and literal compliance with special warranties and deny the right of the libelant to introduce parol evidence to explain or vary the terms of the warranty clauses. This argument recoils, for application of a rigorous rule defeats the purpose for which it has been invoked in these cases. Unless the rules of grammer shall be disregarded, or the phraseology of the warranty changed by a somewhat liberal construction, there is no apparant breach. It is not pretended that the record shows that the Vashon was not employed in the general passenger and freighting business on Puget Sound when the policy was issued. The word "employed" is a verb of the past or present tense and cannot be accurately used potentially to indicate future action unless qualified by additional words not found in these warranty clauses. The argument for the respondents assumes that the warranties relate to future employment of the vessel during the life of the policies and that the clauses should be interpreted to read—vessel warranted to be employed in the general passenger and freighting business on Puget Sound. The interpolation of the words "to be" would materially change the meaning of the clause and it is not permissible to thus interpolate in order to change the meaning of a contract which courts are required to enforce strictly according to the terms assented to by the parties.

The second exception is over-ruled.

The third exception is for alleged failure to allege a valid notice of abandonment on which to base the claim for a constructive total loss. The written notice which was served is criticised on the ground that it failed to specify that the vessel suffered a mishap while employed on the water of Puget Sound. For reasons stated this ground of objection is untenable. The only other criticism of the notice is, that it failed to assign a reason for abandonment of the vessel. The notice states that the vessel sank in the Duwamish River and that acting under the advice of Captain Gibbs, the Underwriter's surveyor, "the owners raised her and placed her on the flats in the lower part of the city, but notwithstanding these efforts she is still badly damaged and her owners consider her a constructive total loss." There is no contention that these statements were untrue, and being true they amount to specifications of a valid reason for abandonment.

The third exception is over-ruled.

The fourth exception is for alleged waiver of the right to abandon by excessive delay without any valid excuse. It appears from the record that the vessel sank on the 15th of December and the owner had notice of the happening on the 16th. The notice of abandonment was given four months thereafter, which was three months after the vessel had been raised and two months after she had been cleaned so as to be in condition for inspection and survey of damages.

For cogent reasons the insured party is required to act promptly in giving notice of abandonment when it is intended to claim for a constructive total loss, and without reasons justifying delay for the period which elapsed in this instance, the insurers have justice on their side in claiming that the right to abandon was waived.

The fourth exception is sustained by the Court.

If the libelant claims that there was any justifiable excuse for delay, leave will be granted to further amend the libel to show the facts.

C. H. HANFORD,
Judge.

Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Oct. 16, 1909. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In Admiralty.

No. 3849. Stipulation.

INDEPENDANT TRANSPORTATION COMPANY, a corporation,

vs.

CANTON INSURANCE OFFICE, LIMITED, a corporation, Respondent.

It is stipulated and agreed between libellant and respondent that Paragraph V of the third amended libel in each of the consolidated causes herein shall be deemed amended to read as follows:

That the said Steamer "Vashon" was securely moored within the tidal waters within and near the mouth of the

Duwamish River, which empties into Elliot Bay on or about the —— day of December, 1907, without notice to respondent that she had been laid up and that no return premium for said laying up had been demanded from respondent or received by libellant, and while so laid up said vessel was by well known and well established custom,—(which custim was fully recognized as such among underwriters on the Pacifit Coast of the United States, particularly at the ports of San Francisco and Puget Sound by virtue of which said custom and under the San Francisco hull time policy) the said vessel was deemed to be and was in fact covered by such policies of insurance and by the policies issued by the respondent herein during the period said vessel was so laid up, no return premium having been demanded therefor.

That thereafter while so properly and securely moored on the evening of the 15th day of December, 1909 the said Steamer "Vashon" sunk and by reason thereof became damaged and that libellant as owner of said steamer suffered a loss and incurred expenses for labor to save and preserve said steamer, as hereinafter set forth.

IRA A. CAMPBELL,
KERR & McCORD,
Proctors for Libellant.

WILLIAM H. GORHAM,
Proctor for Respondent.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, ..., 19..... R. M. Hopkins, Clerk.

In the United States District Court for the Western District of Washington, Northern Division. In Admiralty.

No. 3848.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant.

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LIMITED, a corporation, Respondent.

No. 3849.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant.

vs.

CANTON INSURANCE OFFICE, LIMITED, a corporation, Respondent.

No. 3858.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant.

vs.

CHINA TRADERS INSURANCE COMPANY, LIMITED, a corporation, Respondent.

Upon motion of Respondents,

It Is Ordered that the above causes be referred to A. C. Bowman, Esquire, Commissioner of the above entitled court, to take testimony in said cause and report the same to this Court.

Dated Seattle Washington, April 18, 1910.

O. K. Campbell

C. H. HANFORD,
Judge.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington. Apr. 18, 1910. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

(No. 3848) (Consolidated with Cause No. 3849)

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant.

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LIMITED, a corporation, Respondent.

(No. 3849)

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant.

vs.

CANTON INSURANCE OFFICE, LIMITED, a corporation, Respondent.

(No. 3858) (Consolidated with case No. 3849)

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant.

vs.

THE CHINA TRADERS INSURANCE COMPANY, a corporation, Respondent.

To the Honorable Judges of the above entitled Court:

Pursuant to the order of reference herein dated April 18, 1910, the respective parties appeared before me on the dates shown in the following record:

Mr. Kerr of Kerr & McCord, appearing for Libellant, and Mr. Wm. H. Gorham, appearing for Respondents.

Thursday Morning Session, November 10, 1910.

MR. GORHAM. It is stipulated by and between the parties to the above entitled causes that the testimony to be taken in either or any of said causes may be considered as testimony taken in all of said causes so far as the same is applicable to the issues thereof.

CHARLES H. HAMILTON, having been first duly sworn, testified as follows on behalf of the Libellant.

DIRECT EXAMINATION,

BY MR. KERR.

Q State your full name to the Court?

A Charles H. Hamilton.

Q What is your occupation?

A Steamship business.

Q What relation did you sustain in the month of December, 1907, to the Independent Transportation Company?

A I was Vice President.

Q I call your attention to an instrument in writing purporting to be a bill of sale of the steamer or vessel "Vashon;" I will have it marked Libellant's Exhibit "A" and ask you to state whether that is the bill of sale to the Independent Transportation Company for that vessel, the original bill of sale?

A Yes, sir, that is the original bill of sale, or at least a certified copy of it, I don't know which. Come to think about it, it looks like it is a certified copy. I ain't sure which.

Q I didn't notice it. Will you let me examine it.

A It is a true copy of the original bill of sale.

Q Certified copy?

A Certified copy, certified by the collector of customs.

Q Was the original one filed over there?

A I won't be certain whether the original is on file in the custom house or whether it is in our office.

MR. GORHAM. Whose office do you mean by "our office?"

A Independent Transportation Company. You see the certificate on the back of it.

MR. KERR. A certified copy is admissable.

Q Do you remember at about what date the Independent Transportation Company conveyed the title to that vessel?

A Why, I think it was along in August, 1907.

Q 1907 or 1908?

A 1908 rather.

MR. GORHAM. Conveyed to whom?

MR. KERR. Conveyed to the American Iron and Metal Company.

MR. KERR. I desire to have this paper marked "certificate of ownership Steamer Vashon" purporting to be a certificate of ownership issued by the deputy collector at Port Townsend under date of October 1st, marked Libellant's Exhibit "B" for identificaation.

Q What company was the owner of the vessel Vashon at the time she sunk in the Duwamish River about the 16th of December, 1908?

A The Independent Transportation Company.

MR. GORHAM. We object to that question as calling for the conclusion of the witness.

MR. KERR. I now offer in evidence the Libellant's identified Exhibit "A," being the certified copy of the bill of sale of the steamer Vashon, purporting to have been certified—

MR. GORHAM. We have no objection to Exhibit "A."

Mr. KERR. The Libellant now offers in evidence the identified Exhibit "B," purporting to be the certificate of ownership of the vessel, issued by the Department of Commerce and Labor, Bureau of Navigation, under date of October 31, 1910.

MR. GORHAM. We object to Exhibit "B" for identification as an exhibit and as evidence, on the ground that it contains merely a recital of the Collector of the Port as to his conclusions of what the record is, and does not purport to be a certified copy of the record itself, and therefore is not the best evidence of what the record is and is incompetent.

MR. KERR. For the purpose of further meeting the objection I desire to ask the witness the following questions:

Q Was there any conveyance made by the Independent Transportation Company of this vessel between the date when the title was acquired, as shown by Exhibit "A," and

the date when the bill of sale, under date of August 17, 1908, was executed to the American Iron and Metal Company, as shown in Exhibit "B?"

MR. GORHAM. I object as incompetent, irrelevent and immaterial, as to whether there was a conveyance or not. The title can pass without a conveyance.

Q Did the ownership of said vessel remain in the Independent Transfer Company between the date of the original bill of sale, the Libellant's Exhibit "A," and the date of the transfer to the American Iron and Metal Company, under date of August 17, 1900?

MR. GORHAM. We object as calling for the conclusion of the witness.

A You asked the question if the title did pass, or if the sale was made?

Q I asked you the question whether the title to the Vashon remained in the Independent Transportation Company, the Libellant, from the date when it acquired the title, as shown in Exhibit "A," to the date when it conveyed the title, under date of August 17, 1908, to the American Iron and Metal Company?

A Yes, it did.

MR. KERR. That's all I care to ask Mr. Hamilton at this time. I will recall him and you may cross examine him at length.

MR. GORHAM. I will reserve my cross examination.

CAPTAIN STEPHEN B. GIBBS, having been first duly sworn, testified as follows on behalf of the Libellant.

DIRECT EXAMINATION.

BY MR. KERR.

Q State your full name to the Court?

A Stephen B. Gibbs.

Q In what business were you engaged on December 16, 1907, and what business are you still engaged in?

A I was agent and surveyor for the San Francisco Board of Underwriters.

Q How long have you been acting as surveyor for the San Francisco Board of Underwriters?

A Eight and a half years.

Q To what extent have you represented that organization where the services of a marine surveyor were required at the Port of Seattle?

A I always acted for them when I have been asked to do so from San Francisco or by the owners of the various vessels here in Seattle.

Q Did your duties extend to this port or to the various ports of Puget Sound?

A Various ports.

Q When a loss has occurred on a vessel covered by insurance, is it your custom to await specific instructions form the Board of Underwriters, or do you act for them in these matters without any specific request in each instance?

A Why, I usually wait until I hear, act upon the instructions from the owners or from the underwriters.

Q Do you remember the occasion when the steamer Vashon that is in controversy in this litigation was sunk in the Duwamish River?

A I do.

Q Do you remember about the date, Captain Gibbs?

A Well, I will have to refer to my surveyor report, December, 1907.

Q I call your attention to what purports to be a surveyor's report of the steamer Vashon, purporting to be your signature, which I will have marked for identification Libellant's Exhibit "C," and ask you if you can, by reference to that, refresh your memory and state the date.

MR. GORHAM. What is "C?"

MR. KERR. Surveyor's report.

MR. GORHAM. His report?

MR. KERR. His report.

MR. GORHAM. His original?

MR. KERR. His original report.

MR. GORHAM. Yes, that is all right.

A December 16, 1907.

Q Do you know how long, prior to the time you say here, she was sunk in the river?

A I have here data—the day after she sunk, to the best of my recollection.

Q Who was with you?

A Mr. Stilbeck and Mr. Walker.

Q At whose request did you go out to examine her?

A The request of Mr. Hamilton.

Q Mr. Hamilton who has just testified?

A Yes sir.

Q When you arrived at the place where the vessel sunk, in what condition did you find her?

A Her bow was out in the river, submerged, her stern was up on the bank, the vessel was well up over her main deck.

Q Did you notice the manner in which the vessel was moored?

A I didn't notice it particularly. The moorings were cast astern evidently, the bow seemingly allowing the stern to swing out into the river.

Q Were any of her moorings still attached?

A Yes, one line that was fast—two lines, I think, was fast to the bow. I don't remember exactly.

Q What, if anything, did you do at that time with reference to this vessel; is it all shown in your report?

A All shown by the surveyor report.

Q Does that report correctly represent the condition of the vessel at the time you first observed her, and what was done under your direction in connection with her up to the time that survey was made?

A It does.

Q I call your attention to Exhibit "C"; I will ask you whose signatures are attached to it?

A My signature and Mr. Walker's.

Q That is one of the original surveys?

A Yes.

Q And do you remember at what date that survey was made?

A I would have to refer to the report.

Q Refer to the report?

A This is dated December 16, 1907. April 15, 1908.

Q Is the later date the date when the survey was completed and the report made?

A Yes.

Q What did you find it necessary to do when you visited the vessel and found her in the condition you have described?

A I didn't understand you.

Q What did you find it necessary to do with her?

A Why, Mr. Walker and myself agreed the only way to do was to raise the vessel.

Q What was the stage of the tide at the time you first visited the vessel?

A I don't remember the exact stage of the tide. I should say it was—I should say a long tide.

Q And what is, in your judgment, the rise and fall of the tide at the place where she was moored?

A I don't remember exactly. I should say it was somewhere about six or eight feet, possibly more.

Q To what extent had the vessel been submerged prior to the time you visited her?

A The water had been up well over her cabins.

Q Now, what steps were taken, and under whose direction, to raise this vessel, after your visit of the 16th of December?

A Why, Mr. Walker and myself agreed it was the best

thing to get Captain Genero and Mr. Finch to go out there and raise the vessel, as we outlined in our survey report.

Q Was she raised under your supervision and that of Mr. Walker?

A Yes; we didn't take an active part in it, only to agree to the plans for raising the vessel.

Q Was the raising of the vessel a matter of difficulty or otherwise?

A Yes, it was raised with considerable difficulty. It was a very bad place to work.

Q Do you remember just what was done—about what length of time was required to raise her?

MR. GORHAM. If he knows of his own personal knowledge what was done.

A Pretty hard work to remember just the length of time it took. I think it was about ten days.

Q I think I had better start in now and identify these vouchers by calling your attention to them. We can probably get at both the extent of time—

A It was longer than that. I guess they run it—I guess they run it fifteen or twenty days.

MR. GORHAM. Wasn't it thirty days?

A It might have been. I don't remember just at the present time, just what time. The survey report would show probably. It was longer than what I thought.

Q I want to call your attention to certain vouchers I will later have identified, being the expense vouchers for the raising and docking and work on this vessel preliminary to your final survey, for the purpose of refreshing your recollection as to dates and time that the work was done?

A Of course the survey report shows. If I had looked at that I would have seen it took more than twenty days. It took several days to outline the proposition you see for raising the vessel, and getting started.

Q I will call your attention to a voucher which I have marked on the margin "Exhibit D-1," purporting to

be the pay roll of Schubach and Hamilton, account salvage Steamer Vashon, which voucher indicates the number of days of labor performed on the vessel in December and January, with the receipts of the various parties performing that labor, and in connection with that voucher and your report, would you be able to state about the date when the vessel was floated?

A The survey report states exactly the date it was reported. I would have to refer to that.

Q You would—

MR. GORHAM. I think we can agree on these items of expense. I took those dates from your records. The vessel sunk on the 15th, was floated and moored on the 11th of January.

Q Possibly I can get those dates without going into detail. On January 11th the vessel was floated. Between the 16th of December and January 11th, I wish you would state to the Court with what degree of diligence the work of raising the vessel was prosecuted?

A It was carried on with all the diligence possible. It as a difficult job to raise the vessel, required lots of time. Piles had to be driven; the tide run there very strong. The gear carried away there once or twice and delayed operations.

Q After the vessel was floated what did you find necessary to be done with it before a survey could be made?

A Necessary to haul the vessel out so she could be examined.

Q What arrangements and when were the arrangements made? You can refer again to your surveyor's report to refresh your recollection. Were arrangements made for the docking or taking out of the vessel preliminary to a survey?

A Yes, there was.

Q Do you remember at what time that arrangement was perfected or what was done preliminary to the making of that arrangement?

A Why, Mr. Walker and I discussed—all of us, I think, discussed the situation, and we—Ithink we tried King and Wing's to see what could be done there, and then

we tried Mr. Sloan and his proposition was the most reasonable so we—there was a contract made with Sloan Brothers to haul the vessel out.

Q Were you able either on account of expense or otherwise, to find a dock upon which this vessel could be moored, or was it necessary to make some special arrangement for getting her out on account of the length of time it would consume in making repairs or making a survey?

A We didn't think it was advisable to put the vessel on a dry dock on account of the expense and length of time she would probably be on the dock.

Q What was there about the condition of the vessel, as you observed her after she had been raised, that indicated to you the time the vessel must necessarily remain on the dock, if she was put on the dock, would make the expense prohibitive; what was there in the vessel's condition?

A I think that—I think we figured at the time, there might be some delay over the repairs of the vessel for certain reasons

Q Do you know what kind of fuel she burned?

A Burned oil fuel.

Q After she sunk did the oil escape in any way and defoul the vessel?

A Yes, she was covered with oil; everything was covered, saturated with oil.

Q After you made this contract with Captain Sloan to dock the vessel or haul her out, was there any delay in getting her out of the water, and if so, what was the occasion of it?

A Yes, it took him a long time to lay his ways and get ready to haul the vessel out. He carried away a great deal of his gear in trying to pull her out. He went to work in the wrong way. After he notified us she was ready to survey, we went down there and found her stern was still in the water, so we couldn't—

Q I understand you had to construct marine—

MR. GORHAM: I don't think you ought to lead the witness.

Q What did Captain Sloan have to do, if anything, preliminary to hauling the vessel out of the water?

A He had to build his ways, and erect his approaches, tackles, etc.

Q Was Captain Sloan, in your judgment, a competent person to haul that vessel out of the water?

A Yes, I thought he was at the time.

Q Now, when you examined the vessel, as I understand you, after Captain Sloan had started to haul her out, you found her only partially out of the water?

A Only partially out of the water.

Q To what extent was the vessel—what part of the vessel was submerged?

A The aft end of the vessel was still in the water.

Q Was it possible or practical to make a survey of that vessel in that condition?

A It was not.

Q Did Captain Sloan prosecute diligently the work of hauling her up to that position in the first instance and in getting her out so that the survey could be made?

A Well, it appeared to me as though he took a great deal longer time than was necessary to do it.

Q What effort, if any, did you make to hasten that work, in that you supplied anything, or what did you do?

A We simply told him, we didn't like to interfere with his plans for hauling the vessel out, as it was a contract job. It was evident to us he went to work the wrong way, used up a good deal of time and money. He lost a good deal of money.

Q What I am getting at, were you endeavoring to have him complete his work, or not?

A Yes, we told him we would like to have him hurry up on the job.

Q At what time did you find the vessel stuck on the waves, do you remember? Does your report show?

A No, I don't think my report shows that.

Q At what time did he finally get the vessel out of the water so that a survey was possible?

A For that I would have to refer to this report. The report is dated April 15th.

Q How long prior to the date when you made the survey had the vessel been hauled out of the water so that you could survey it?

A I think we made the survey just as soon as she was out in a condition so that we could go through it. That is the best of my recollection.

Q Do you remember of being down there with Mr. Walker and Captain Genero at the time she was stuck on the waves, when Captain Genero took a lantern and was about to enter her hold?

A Yes, I think I do recollect.

Q Was or was not the oil, fuel of the vessel, in the hold?

A It was.

Q Was there any gas from it in the hold?

A That we were unable to determine, but there was liable to be gas from it.

Q Was it practical or was it safe, in your judgment, to attempt to have surveyed her at that time or to have entered her hold for the purpose of making the survey?

A It was not.

Q Now, when Captain Sloan got her out on the waves, what was done in reference to her planking, if anything, preliminary to making the survey, what was done?

A We recommended the two planks be taken out of the bottom and the inside of the vessel be cleaned out, washed, so we could go through her.

Q For what reasons did you require that to be done?

A Because we considered it dangerous to go through the hold with the planking so full of oil.

Q Was there any time lost, in your judgment, from the time this vessel was sunk and you started in to raise her, until the time this survey was made, in enabling you

to arrive at the condition of the vessel and make a survey and report on it?

MR. GORHAM. We object as cross examining his own witness. The witness has already testified there was considerable delay and time lost by the contractors on account of their incompetency.

MR. KERR. No, he didn't.

MR. GORHAM. He did testify it. Leave it to the record.

Q Now, Captain, in your own way, I simply want the truth about the matter, as you understand it?

A No time lost as far as Mr. Walker and myself were concerned.

MR. GORHAM. We move to strike out the answer of the witness as not responsive to the question.

Q Did you let a contract to Captain Sloan to raise the vessel?

A The owners let a contract to Mr. Sloan to pull the vessel out.

Q I understand you to say you and Mr. Walker had personally negotiated for a place in which the vessel could be pulled out with King and Wing as well as Captain Sloan?

A Yes, but we were—we didn't make any contracts. We simply made the recommendation.

Q You were cognizant that a contract had been let to Mr. Sloan?

A Yes.

Q That was satisfactory to you as surveyor?

A Yes sir, it was.

Q The owners of this vessel, were the owners of this vessel, to your knowledge, guilty of any delay, or responsible in any way for any delay of the contractor, Sloan, in getting this vessel out so she could be surveyed?

MR. GORHAM. We object, as calling for the conclusion of the witness. He can state the facts.

A Not so far as I know.

Q After this planking had been removed, as I understand your testimony, you at once made this survey?

A As near as I can recall, we did.

Q This Exhibit "C," the original of your survey, was delivered to the libellant?

A It was.

Q During the time that elapsed from your first examination of this vessel and your final survey, were you in conference at any time with either J. M. E. Atkinson and Company or Mr. Tomlinson, representing that company, by whom the policy of the Yang Tsze Insurance Associations and the China Traders were issued, and Harris & Company, or Mr. J. R. Mason, the agent by whom the Canton Insurance policy was issued?

A I think they were in the office several times. I wasn't in consultation with them. We only discussed—told them what we were doing, that was all.

Q Did they have knowledge you were making this survey or taking the preliminary steps to make it?

A They knew I was making it.

Q Did you make a disposition of this vessel subsequent to the time when she was raised, did you sell her, dispose of her?

A No.

Q Did you conduct any negotiations for the sale of the vessel after you had made the survey?

A After we made the survey, after she was raised.

Q That is after she was raised?

A Yes, I tried to see if we could get an offer for the vessel.

Q During what length of time did you attempt to negotiate the sale of this vessel, do you remember?

A I don't know just the length of time.

Q In attempting to negotiate the sale of the vessel, were you acting for the members of the San Francisco Board of Underwriters.

A I was acting for the interest of all concerned.

Q Did you have any communication at all with the San Francisco Board of Underwriters with reference to this vessel from the time you first saw her to the time the ultimate survey was made?

A I wrote them, kept them posted just what was going on. I received no instructions from them.

Q You informed them what was going on?

A Just informed them as I do in all cases.

Q Was that the course you usually took in these matters?

A Yes.

Q Same course?

A Yes.

Q Was there any understanding at all or agreement between the owners and the underwriters, by which you were authorized to make a sale of the vessel in her damaged condition?

A I think there was.

Q She was ultimately sold, was she not?

A She was.

Q For $750?

A She was.

Q Did you examine at the time these expense vouchers, aggregating something over $3000., covering the cost of raising this vessel and the work that was done preliminary to the survey?

A I did.

Q These items of cost represented by these vouchers that bear the approval of your office and they are a reasonable cost for that work. I don't know there is any controversy over it?

A None that I know of.

Q At the time you first visited the vessel, did you observe whether any anchors were out?

A I think there was an anchor out forward, yes.

Q About how far above the Spokane Bridge on Spokane Avenue was this vessel moored, in a direct line?

A I don't remember just how far it was. It was a short distance above the boat house there, I should say about one hundred yards above the boat house, but I didn't take notice how far it was above the bridge.

Q On which side of the river was she moored, do you remember?

A On the right hand side of the river.

Q Looking up?

A Yes.

Q That would be south side of the river, would it not?

A Yes.

Q Did you observe any hawsers attached to the piling to the rear of the vessel or forward?

A Yes, I saw a hawser attached.

Q Which end of the vessel was up on the bank?

A The stern.

Q Down by the head?

A Yes, down by the head.

Q Up to the time you made this final survey, was it possible or practical to have made a final survey to ascertain the extent of the injuries to this vessel?

A No, I don't think it was.

MR. KERR. I will now offer in evidence the Libellant's identified Exhibit "C." being the original survey.

CROSS EXAMINATION.

BY MR. GORMAN.

MR. GORHAM. We desire to ask the witness some questions touching Exhibit "C", before we determine whether we will object to the same on any grounds.

Q This exhibit, Mr. Gibbs, recites at the beginning that at the request of the owners, the undersigned held the

survey on December 16, 1907. Your signature is subscribed to the exhibit. Were you acting on December 16th for the owners solely?

A We are usually called upon by the owners on all cases of this kind, and I was acting at that time at the request of the owners. I didn't know just where the insurance was placed.

Q You didn't know the underwriters of San Francisco were interested or not?

A To the bast of my recollection, at the time they called on me, I didn't know who was interested.

Q You, being a marine surveyor, was willing to act in a surveying capacity at the request of the owner?

A I was.

Q You had no instructions from the Underwriters at that time to act for them?

A No.

Q Before you make a survey for the Underwriters, you await instructions from them, do you not?

A We usually are called upon by the owners, who know that our—We are usually called upon by the owners or adjusters. I am usually called on by owners or adjusters to make the survey.

Q That is an independent survey, isn't it? You, as a marine surveyor, do the surveying for them as an independent survey?

A Not always.

Q In a case where you are requested by the owners and adjusters?

A I don't know just exactly what you mean by independent survey.

Q You don't attempt to bind the Underwriters of San Francisco, whose agent you are at sometimes, when you are called upon to go and survey a vessel at the request of the owners?

A No.

Q You didn't in this instance, did you?

A No.

Q As a matter of fact you are surveyor to the San Francisco Board of Marine Underwriters and act for them?

A I do.

Q When requested?

A I do.

Q Mr. Sloan has been referred to by counsel as Captain Sloan. Mr. Sloan is not a seafaring man, is he?

A I don't think he is.

MR. KERR. I did that because I saw on a voucher "Captain Sloan."

Q You made no contract with Captain Sloan for hauling that vessel out, either in your own individual behalf or on behalf of the Underwriters of these insurance companies involved in this litigation?

A To the best of my recollection it was done by the owners at our suggestion.

Q The vessel sunk on December 15th; it was floated on January 11th following, floated and moored on January 11th. Let me refresh your recollection and ask you whether or not the vessel wasn't hauled out on February 12th, just a month and a day after it was floated?

A I can't remember the dates.

Q You haven't any data to fix that date?

A No, I haven't the data, without referring to my letters at the office.

Q Were you advised at any time by the respondent in these case, the Insurance Companies, that they denied liability under their policy?

MR. KERR. I object as immaterial.

A I think Mr. Mason told me they were going to deny liability.

Q Did you know as early as April 25th, 1908, that the individual respondent insurance companies in these causes advised the libellant, the Independant Transportation Company, that they denied liability under their policies?

A No, I didn't know what action they had taken with the owners.

Q When did you try to see if you could get an offer for the vessel, between what dates?

A I don't recollect the dates now, it was so long ago. it was after the specifications were made out and tenders called for. I don't remember the dates.

Q Were you instructed by the insurance companies involved to join with the owners in an effort to sell the vessel?

A No, I don't think I was. I have no recollection of it.

Q You weren't acting for the insurance companies in that behalf at the time you were trying to see if you could get a buyer, under instructions from them?

A I knew the underwriters were interested. I was acting for the benefit of everyone.

Q But you had no instructions from them?

A No instructions, no.

Q What was the understanding between the owners and the underwriters as to the sale, an understanding in writing or an oral understanding?

A I think there was an understanding in writing.

Q Where is that writing?

A I don't know where it is.

Q Did you ever see it?

A No, I don't think I did.

Q You don't know its contents then?

A No, I am not quite sure on that point.

Q Don't you know, as a matter of fact, that the respondent companies in these causes, in writing, on the 25th day of April, 1908, denied liability to the libellant under these policies, and weren't you so advised by Mr. Mason?

A I think I was advised by Mr. Mason to that effect.

Q You say that at the time the work was progressing

in an effort to haul the vessel out, that there was some delay by carrying away of the gear?

A Yes.

Q Who had charge of the work of hauling that vessel out?

A Mr. Sloan.

Q When she was hauled out in the river, I mean?

A You mean when she was raised?

Q When she was raised, yes?

A Captain Genero and Mr. Finch.

Q Who is Mr. Finch.

A He is a diver. He was working under Captain Genero.

Q Who was Captain Genero working under, the owner, the Independent Transportation Company?

A He was working under Mr. Walker and myself.

Q Who was paying him?

A The owners of the vessel.

Q And whom did Captain Walker represent?

A The owners.

Q Do you know that he was authorized to represent them?

A Only from his statement.

Q And by the action of the owners?

A Yes.

Q And who were you representing now, in the matter of the raising, I am speaking of?

A I was representing the owners for the time being.

Q You were not at that time representing the underwriters?

A Well, of course the underwriters were interested. I knew they were interested. I was called on by the owners.

Q You were called upon by the owners?

A Yes.

Q You had no instructions from the underwriters?

A None whatever.

Q Now, is the same true as regards the bills and work of hauling her out after she was floated?

A The same, yes.

Q And is the same true as regards the survey of the vessel after she was hauled out?

A It was.

RE-DIRECT EXAMINATION,

BY MR. KERR.

Q Captain Gibbs, the owners of this vessel, when she was sunk, under their policies were required to notify you, as the representative of the board of marine underwriters, were they not?

MR. GORHAM. The policies speak for themselves.

A I have never seen the policies; I don't know.

Q That is the fact, was it not? The reason you were notified by the owners in this case was that you represented the underwriters?

MR. GORHAM. We object. This witness doesn't know what reason the other man had in notifying him. The other person can testify what his reason was. This witness is incompetent to testify to such a state of facts and his testimony is incompetent in the record. We object to it on that ground.

A I presume that is the reason.

MR. GORHAM. We move to strike the answer of the witness out as not responsive to the question. It is his presumption.

Q Captain Genero was deputy under you?

A He was.

Q I notice on all these vouchers, stamped by your office, as follows: "Approved subject to discounts and

rebates, if any, and adjustment in the usual way. E. C. Gibbs, Surveyor B. M. U." The letters B. M. U. mean Board Marine Underwriters, do they not?

A Yes.

Q So that in approving these expense vouchers, you approved them as the surveyor for the board of marine underwriters in every instance, did you not?

A I did.

Q Mr. Walker was acting as—he was not acting for the board of marine underwriters, was he?

A No.

Q He was acting for the owners?

A He was.

Q So that in this case, as in all other cases where an insured has had a loss on his vessel covered by policies of members of the marine board of Underwriters of San Francisco, it is customary for the insured to notify you, as the representative of the marine board of underwriters?

A Yes.

Q That is the way. And the notice that was given to you was given to you by the owners in this case as in cases generally where there is a loss covered by policies of the marine board of underwriters, is that right?

A I think it was.

Q Now, the libellant in this case did not employ you as a surveyor independent of the fact that you represented the marine board of underwriters, did they?

MR. GORHAM: We object to that question as cross-examination of his own witness. He has testified he was acting at the request of the owners and without instructions from the underwriters.

Q We admit he acted at the request of the owners in accordance with the custom that requires the owners to notify the surveyor of the board of marine underwriters?

A There is no way of determining that.

Q Doesn't this determine this, Captain Gibbs. Everyone of these expense vouchers bears the aproval of Mr. Walker,

who was employed by the insured, together with the approval of Captain Genero or yourself, representing, according to your own endorsement, the board of marine underwriters, and that it was necessary, in accordance with the usual practice in losses of this kind, where the board of marine underwriters are represented, to have the vouchers approved by the individual surveyor of the owner as well as the surveyor for the board of marine underwriters?

A It is.

Q When you approved these vouchers and put the stamp of your office upon them as surveyor for the board of marine underwriters, isn't it true, Captain Gibbs, (and these vouchers at the same time bear the individual endorsement of Mr. Walker acting for the insured), that these vouchers bore these double endorsements for the reason that that is the practice to have the vouchers bear the endorsement both of the surveyor for the individual as well as the surveyor for the underwriter?

A It is a common practice.

Q Now, take in case where you are notified by the owner of damage or loss to a vessel, you receive your compensation from the owner originally, and upon the adjustment of the loss, the expense of your services as surveyor for the board of marine underwriters, where there is more than one policy, is approved and paid by the companies represented by the board of marine underwriters, in accordance with the amount of insurance carried for them respectively on the vessel?

A It is.

Q One thing I overlooked in my direct examination, I want to refer back to. Captain Gibbs, you stated that you had made efforts to make disposition of this vessel and that $750 was obtained for her in her damaged condition. I will ask you whether that amount was a fair and reasonable price to be paid for the vessel in her damaged condition?

A I think it was.

Q There was $15,000 of insurance carried upon this vessel, all of it, we will assume, by the members of the board of marine underwriters of San Francisco. Did you have anything to do whatever with determining the value of this vessel for the purpose of this specific insurance?

MR. GORHAM: You mean prior to the negotiation of the insurance, at the time of the negotiation of the insurance?

Q At the time the insurance policies were taken up?

A I was called upon by the owners to make a survey, which, I presume, was for the purpose of insurance.

Q At that time did you undertake to determine the value of the vessel?

A I did.

Q What, in your judgment, was the fair and reasonable market value of this vessel immediately before she was lost, sunk, if she had been offered for sale in the open market by a party who was under no obligation to sell her, and was purchased by a party who desired to purchase a steamer, but was under no obligation to buy it? What would she be worth in your judgment?

A That is a pretty hard question to decide, just what she was worth. I found out what thevessel was bought for and what repairs had been laid out on her. My valuation was made, I think, about $17,000.

Q You learned that the libellant paid, a short time before this insurance was taken out, for this vessel, the sum of $12,500, and had made on the vessel after she was purchased and before the insurance was written, improvements, making the aggregate cost of the vessel about $17,000?

A Yes sir.

Q That, in your judgment, was about the value of the vessel at that time?

A I think that was about the value.

Q In any loss, under any policy of insurance, marine insurance, of a company which is a member of the board of marine underwriters, I will ask you whether or not it is not the universal custom of the owners of such vessels to notify you of such loss as soon as it occurs, because of the fact that you are the representative here of the board of marine underwriters?

A I think it is.

Q All marine men and owners of vessels in Puget Sound know that you do represent that board, do they not?

A Most of them.

Q And on a loss on one of these marine policies, as I understand you, it is always customary for the insured to give prompt notice to the surveyor for the insurance company, if such surveyor is known?

A It is.

Q And you, being the surveyor for the board of marine underwriters, if the insurance company is a member of that organization, it is the duty of the insured to inform you?

A It is.

Q You then proceed to examine the vessel?

MR. GORHAM: I wish you wouldn't lead the witness so much. I think he ought to be able to testify himself; he is a very intelligent man.

MR. KERR: I will withdraw the question.

Q What do you do on receiving such notice, that is with reference to taking action, before communicating with the board, or otherwise?

A I communicate with the board sometimes before taking action, and sometimes I take action without communicating with the board. That is, I always communicate, of course,—

Q Is it actually your custom, where a vessel has sunk, for instance, here at Seattle, or at the place where this vessel was sunk, within that close proximity to your office, and you are notified, do you usually await specific instructions from the underwriters before going to make your examination, or do you not?

A I do not.

Q Now, when Mr. Hamilton notified you in this case that this vessel had sunk in the Duwamish, you didn't understand, did you, Captain Gibbs, that by giving that notice to you, that he was employing you to represent him as distinguished from the underwriters?

MR. GORHAM: We object to this line of re-direct examination as a cross-examination of the witness. He has testified in what capacity he went out there and at whose request.

MR. KERR: I want to get that clearly before the Court, what Captain Gibbs' relation to it was.

MR. GORHAM: We object as not proper re-direct examination.

(Question read.)

A Why, I took it for granted he was calling on me, as is usually the custom for owners to do.

Q Who had policies of insurance in the companies represented by the underwriters?

A Yes.

Q. Do you always act, in making these surveys, in conjunction with Mr. Walker, or do you act with other marine surveyors?

A Act with other surveyors.

Q You act with whatever surveyor the insured, the owner, happens to employ to represent him?

A Yes.

RE-CROSS EXAMINATION

BY MR. GORHAM:

Q At the time your office, through Mr. Genero or Captain Genero, approved the vouchers for the expense of raising and hauling out and repairing the vessel, or raising and hauling out the vessel, referring to the approval by Captain Genero of the expense vouchers, concerning which you have been interrogated by counsel for the libellant, as follows, "Approved subject to discounts and rebates, if any, and adjustment in the usual way", Signed, "E. C. Gibbs, Surveyor B. M. U.", was Captain Genero authorized by you to make such approval?

A He was.

Q And he was doing it on behalf of your office?

A Yes.

Q Was he authorized by you to bind the San Francisco board of marine underwriters?

A He didn't bind the board of marine underwriters. That stamp is always put on every bill we approve.

Q It is not put on there for the purpose of binding any of the board of marine underwriters, or any of the insurance companies members of the board?

A No.

Q What is the object of the stamp then?

A Simply to show the bill has been approved by the surveyor as being a just bill. It doesn't bind for every item of the bill, is the reason that item is put in, "subject to rebates, adjustment in the usual way."

Q Does it mean this, if the underwriters approve the expense, then the amount thereof is adjusted subject to discounts and rebates as you have approved it?

A Yes.

MR. KERR: I object as incompetent.

Q You say in arriving at the value of the Vashon at the time the insurance was negotiated involved in these causes, that you took the cost price a short time before paid by the Independent Transportation Company, and to that added what they had put on in the way of betterment, and the aggregate was the valuation?

A That was—to a certain extent that was used.

Q You won't say what the market value of that vessel was at this time?

A No, I wouldn't say what the market value was.

Q You won't say what the market value was of the vessel on the 15th day of December, 1907, before she sunk?

A No.

Q Now, at the time you made your investigation and survey of the vessel, after she was raised, was there anything in her condition which excited your suspicion as to whether or not the loss had been by natural causes, or had been induced by human agency?

MR. KERR: Objected to on the grounds that it is not proper cross-examination, immaterial and irrelevant and not an issue of any kind in this case.

A You mean after she was raised?

Q At any time when you were making the survey of her?

A Captain Genero reported that he found a couple of blocks out of the side of the vessel.

MR. KERR: I move to strike it out on the ground it is incompetent.

Q At what time did he make that report?

MR. KERR: Same objection.

A Made that report, I think after the vessel was raised, during the time they were raising the vessel, I think.

Q What effect would that have on the vessel as she lay moored?

MR. KERR: Same objection.

A Have the effect of filling her with water.

Q Did you report that fact to the underwriters at San Francisco?

MR. KERR: Same objection, incompetent, irrelevant and immaterial.

A I think I did.

Q In writing?

A Yes.

Q Do you know just the location of those blocks and the size of them?

MR. KERR: Same objection.

A About one and one-half inch blocks, I think, to the best of my recollection.

MR. KERR: Same objection.

Q Where were they located?

MR. KERR: Same objection.

A In the hold, below the main deck.

Q And below the water line?

MR. KERR: Same objection.

A I think they were.

Q That is below the water line as the vessel lay moored without cargo?

MR. KERR: Same objection.

A Yes sir.

Q What's the character of those blocks and the character of that fitting?

MR. KERR: Same objection.

A We don't know what the holes are made there for. Evidently been used for some purpose and then these blocks put in.

Q After the vessel was sunk and you made an examination of her on December 16, 1907, did you hold any communication with Mr. J. R. Mason, who was at that time agent for the Canton Insurance Office, one of the respondents in these causes?

A I think he was up in the office and we discussed—I told him the particulars about the case.

Q Do you remember that he was at that time representing in Seattle the Canton?

A I do.

Q Do you remember at that time of his cautioning you not to act for the underwriters or the Canton Insurance Office in any matter concerning the raising of the vessel?

MR. KERR: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

A. I don't know that he did. He might, but I don't remember.

Q Do you remember that there was an understanding between you and Mr. Mason, as agent as aforesaid, that any activity on your part in reference to the raising of the vessel, was stated by you to be done at the special instance and request of the owners themselves, without regard to the underwriters?

MR. KERR: Same objection.

A I remember making a statement to him that I had been called upon by the owners to act in this case.

Q Do you remember that you at that time stated to him that you were acting solely in your capacity as an individual surveyor, at the request of the owners, and without regard to the responsibility of the underwriters?

MR. KERR: Same objection.

A I don't know; I might have made the statement.

Q Was that the effect of it—

MR. KERR: Same objection.

Q —in regard to the—raising of the vessel?

MR. KERR: Same objection.

A I remember of telling Mr. Mason I was called upon by the owners to act in this case, but I had received no instructions from the underwriters to do anything in the matter.

MR. KERR: I move to strike out the answer.

Q. Didn't you tell him it was distinctly understood between you and the owners you were acting as an expert marine surveyor in their behalf, at their request?

A No, I don't remember saying that.

Q Do you remember that he at that time warned you not in any way to act in a manner that would bind the underwriters?

MR. KERR: Same objection.

A. I think he did.

Q Did you recognize his authority as agent for the Canton Insurance Office to so advise you?

MR. KERR: Same objection.

A Yes.

Q Did you communicate that to the Independent Transportation Company?

A I did not.

RE-DIRECT EXAMINATION.

BY MR. KERR:

Q Captain Gibbs, you never saw those blocks that were alleged to have been removed from the hull of this vessel yourself?

A. I did, yes.

Q Did you see them in the vessel?

A I did not see them in the vessel, no.

Q You saw the places they had been removed in the vessel?

A Yes.

Q Was that after the vessel had been hauled out and the planking removed?

A I am not quite clear on that point, whether the planking had been removed or not when we saw them.

Q Those planks didn't extend through the hull of the vessel; they were on the inside, what is known as the skin of the ship?

A I didn't investigate to see whether they extended through. I understood from Captain Genero they did.

Q You don't know whether they extended through or not?

A No, I wouldn't swear to it myself.

Q You don't know when they were removed, whether before the ship was sunk, or after she was taken out of the water, personally you have no knowledge?

A No, only from what I heard from Genero.

MR. KERR: I move to strike out the Captain's testimony in regard to that matter, on the ground that it is incompetent, irrelevant and immaterial, and not an issue in this case.

MR. GORHAM: We submit at this time that he says Mr. Genero was acting under his instructions.

MR. KERR: I don't care whether he was or not. It is hearsay, incompetent, irrelevant and immaterial.

Q I find on some of these vouchers your approval personally?

A Yes sir.

Q As surveyor B. M. U., that is right.

A Yes.

Q Suppose there would have been no disposition on the part of the insurance companies whatever to have contested this loss, and these vouchers had been passed up to the board of marine underwriters with your endorsement on there, "subject to discounts and rebates, and adjustment in the usual way. E. C. Gibbs, surveyor B. M. U.", you would have expected the underwriters to have accepted that, as your endorsement and approval? They would have accepted it?

A I think they would have accepted my endorsement.

Q They wouldn't have questioned it at all. They would have accepted that endorsement and approval without any quibble whatever, wouldn't they?

A Not always.

Q It was put on there for the purpose of enabling the owner, in the event that these policies were paid, to have the amounts dated and approved for the cost of raising that vessel, and that these several items of cost that were approved by you and also approved by Mr. Walker were proper items of expense?

A That was our idea in approving them. They were approved because they were proper items.

Q But you knew when you approved them that if this matter was adjusted amicably between these parties, that these vouchers might be passed up with your approval on them to the board of marine underwriters or to the members of it?

A I did.

Q They would indicate they were your approval as surveyor for the board of marine underwriters, just as the stamp shows?

A Yes sir.

RE-CROSS EXAMINATION.

BY MR. GORHAM:

Q You asked him about the location of that wreck, and he said it was above the boat house. It was also up the river from the old brick yard, was it not?

A I think so.

Q You remember the old brick yard at that time?

A Yes sir.

Q It has been a land mark there ever since you have been there, hasn't it?

A Yes, as far as I know.

Witness excused.

CHARLES H. HAMILTON, recalled, testified as follows:

RE-DIRECT EXAMINATION.

BY MR. KERR:

Q At the time this insurance was written in what trade and where was the Vashon employed?

A Running from Seattle to Alki Point.

Q Carrying what?

A Mostly passengers, a little freight occasionally.

Q Did she continue in that traffic until she was laid up?

A Yes, sir.

Q Within a radius of thirty miles of Seattle, is it?

A Yes sir.

Q How long did she continue in that business after this insurance was taken out on July 16, 1907?

A She continued in there until some time in August.

Q Then what was done with her?

A She was moored at what is known as the King Street dock until she was taken to the Duwamish in December.

Q Where was the King Street dock?

A Just below the old coal bunkers at the foot of King Street.

Q In Seattle?

A Yes sir.

Q At what date was she taken up to be moored in the Duwamish River?

A About the first of December.

Q Was she taken directly from the King Street dock to her mooring in the Duwamish?

A I think she was.

Q Whereabouts with reference to the Spokane bridge was she moored in the Duwamish River?

A I should say in a direct line, possibly a quarter of a mile above the Spokane Avenue bridge; according to the meanderings of the river possibly half a mile.

Q Were there other vessels moored in the river?

A Yes sir.

Q Do you remember the Steamer Venus?

A Yes.

Q Were you up there after she was moored and before she sunk?

A Yes sir.

Q I wish you would state to the Court the manner in which she was moored, and for that purpose I will call your attention..... to a rough sketch or diagram, which I will have marked for identification Libellant's Exhibit "E".

MR. GORHAM: Will you let that show that is part of proof of loss. Let the whole thing go in as "E"? In other words I don't want to show it is a new diagram. It is the diagram originally attached to the proof of loss.

MR. KERR: I don't understand that at all, this was part of the proof of loss.

Q I call your attention to a paper which is attached to the affidavit of Fred Warner and Frank Faber. Does that

diagram represent in a general way the manner of the vessel's mooring?

A Yes sir.

MR. GORHAM: We object as incompetent. This witness hasn't qualified as a mariner.

MR. KERR: I am not asking whether he is competent.

Q Just state in a general way what lines you observed to be out on the vessel, how they were fastened, whether anchors or piling or what?

A The vessel was moored with her head up stream. There was one anchor out from the bow on the port side and a line running from the bow on the starboard side. There were two lines run out from the stern, one from the starboard side and one from the port side. I think there was a brace line run out from either about midships or a little aft midships towards the shore to a pile. In fact I think all of the lines were made fast to piles excepting the one by the anchor.

Q About what time did you examine her with reference to the time she was moored there?

A I went up there a few days after she was moored to see what position she was in.

Q Did she or not appear to you to be in safe moorings, safe position?

A Yes, she appeared to be in a very good position.

MR. GORHAM: We object as incompetent and move to strike the answer of the witness out.

Q When did you first learn that the vessel had sunk?

A The following morning.

Q December 16th?

A Yes, I think that was the date.

Q What did you do on receiving notice that the vessel had gotten into trouble?

A Instructed Captain Warner, who was our port captain at the time, to go over there and examine into the vessel, examine into the accident, and also notified Mr. Walker and Captain Gibbs that the vessel had been sunk.

Q Did you personally notify Captain Gibbs?

A I think I did, either in person or over the telephone.

Q How did you happen to notify Captain Gibbs?

MR. GORHAM: We object as immaterial and not binding upon the respondents.

Q Just answer?

A It has always been customary with us to notify Captain Gibbs at any time there was any accident to any of our vessel property, as he represented the board of San Francisco underwriters.

Q These policies that you have were in companies that were members of that board, as you understood it?

A Yes sir, at least part of them were.

Q Did you employ Captain Gibbs, or your company employ Captain Gibbs as an individual surveyor to survey this vessel for you?

MR. GORHAM: We object as tending to impeach the libellant's witness, Captain Gibbs, heretofore put on the stand by the libellant.

A We employed Captain Gibbs not as our direct representative.

Q Who did you employ as your direct representative?

A Frank Walker.

Q How long have you been in the transportation business here in Seattle?

A Well, off and on since '92. Not all the time continuously.

Q Have you had, during the last eight or nine years, since Captain Gibbs has been a resident here as representative of the board of marine underwriters, any losses on any policies of insurance on any of your vessel property?

A We have had some partial losses.

Q Some partial losses?

A Yes sir.

Q Who in those cases acted for the board of marine underwriters?

MR. GORHAM: We object as immaterial.

A Captain Gibbs.

Q Did you give any different or other notice then in this particular instance than you had given in other instances of a like character?

MR. GORHAM: Same objection.

A No sir.

Q Among ship owners, charterers and operators here on Puget Sound, who, if anyone, is generally understood to represent the board of marine underwriters of San Franciscos

MR. GORHAM: We object as incompetent.

A Captain Gibbs.

Q Now how and on what theory did you hand your report to Captain Gibbs, what was your reason for doing it?

MR. GORHAM: We object as incompetent, irrelevant and immaterial and not binding upon the respondent companies.

A We notified Captain Gibbs for the reason we knew he represented the San Francisco board of marine underwriters and that they were interested in this insurance we had on the Steamer Vashon, and to protect our interests, we considered that it was necessary to have a representative of the insurance company on the survey.

Q Did Captain Gibbs at any time during the time, or from the time this vessel sunk up to the time the final survey or disposition of the vessel was made, ever inform you or indicate to you that he was representing anybody else than the board of marine underwriters?

MR. GORHAM: We object as an attempt to impeach the witness Gibbs of the libellant.

MR. KERR: I am not trying to impeach anyone. I am trying to find out what the facts are.

A No.

Q Why did you have these vouchers for money expended by this libellant in raising that vessel and putting her in a position so that she could be surveyed, approved

before they were paid, by the surveyor of the board of marine underwriters of San Francisco? Why did you get that endorsement as well as the individual endorsement of your surveyor?

MR. GORHAM: We object as incompetent, irrelevant and immaterial, and not binding upon the respondents.

A We have always thought it was necessary to have the approval of both the surveyor for ourselves and the surveyor for the board of underwriters, of all bills, in order to collect from the insurance company.

Q In any other losses you have had where bills of expense were incurred, what did you do, if anything, with reference to getting the endorsement of Captain Gibbs or his office?

MR. GORHAM: We object as incompetent, irrelevant and immaterial.

A We did precisely as we did in this case with the endorsement.

Q Did they pay those bills, the insurance companies, members of the board that he represented?

MR. GORHAM: Same objection.

A Yes sir.

Q At the time you incurred these expenses, under direction of Captain Gibbs and of your own surveyor, Mr. Walker, paid these various bills, did you at any time have any knowledge or information that Captain Gibbs was acting for anybody else than the insurance company?

A No sir, I did not.

Q After this vessel sunk how soon was that you visited it?

A I think I went over there on the 16th or 17th.

Q Did you observe the work that was done in raising the vessel and getting her afloat and in docking her finally?

A I only made the one trip over to her while she was sunk. I didn't see her again until she was raised and brought over to Sloan's ship yard.

Q Where is the Sloan ship yard?

A Near the Albers' mill.

Q Did your company make a contract with Sloan to haul this vessel out so she could be surveyed?

A Yes sir.

Q Do you remember about the date when that contract was made with reference to the time she was raised?

A I think it was sometime in January, the latter half of January.

Q What, if any, negotiations had you, had your company attempted to make for the docking of this vessel, so she could be surveyed, at the time you actually entered into the contract with Sloan?

A Captain Warner, on our behalf, looked around to see where the vessel could be hauled out. It was our idea it would probably take some little time to make the repairs. We wanted to haul her out in a place where we could do it the cheapest and store her the cheapest. We had either Captain Warner or one of the surveyors see King and Winge about it. They could haul her out, but they wouldn't keep her any length of time except at a large expense, and for that reason we made the contract with Sloan, as he made us the cheapest offer for hauling out and storing.

Q Did you loose any time at all after that, either in the raising of the vessel or after the raising of the vessel, in an attempt or in making arrangements to have her pulled out so she could be examined?

MR. GORHAM: We object as leading. State what he did. The Court will determine.

A No, we did everything possible to hurry the matter along; there was considerable delay in raising her in the first place on account—

Q Was the work prosecuted continuously or otherwise in raising?

A I think it was prosecuted continuously.

Q Was there any delay after Captain Sloan took charge of her for the purpose of pulling her out?

A There was the delay of getting ready to pull her out. He had no ways ready. He was delayed in getting those ready. He was also delayed after he started pulling her out by reason, I presume, of not having proper gear. He only got her part way out and then had to go over it again.

Q You have spoken of Sloan as proprietor of the ship yard. I will ask you to state whether Sloan was, in your belief, a competent person to do that work successfully as well as speedily?

MR. GORHAM: We object to that question as incompetent and immaterial, whether this witness believed he was competent or not. The question was whether he was competent, not what the witness believes.

A As far as we knew, Sloan was competent to do the work.

Q How long had he been working in the ship building business here?

A That I don't know.

Q Did your companyy, in contracting with Sloan to haul this vessel out so that she could be surveyed, believe that he could do the work in a reasonable time?

MR. GORHAM: We object as immaterial, what they believed.

A Yes, we did.

Q Now, what effort did you make, if any, to induce Sloan to facilitate the work, after the vessel stuck on the ways or before that time?

A We were continually after Sloan to use his best efforts to hurry the thing along as fast as possible.

Q How long was it after the vessel was actually hauled out before the survey was made?

A Why, I think the vessel was hauled out about—completely hauled out about the middle of February, but the final papers in the survey were not delivered to us until about the middle of April.

Q How much money did the libellant expend in raising this vessel and getting her out where the survey could be made?

A I think it was between three and four thousand dollars; that includes all the salvage operations.

Q Under whose supervision were those expenses incurred, if any?

A Under the supervision of Mr. Walker and Captain Gibbs.

(Recess taken.)

Thursday Afternoon, November 10, 1910.

CHARLES H. HAMILTON, Recalled.

DIRECT EXAMINATION

BY MR. KERR:

Q I call your attention to three policies of insurance which I have had marked for identification the libellant's exhibits "F", "G" and "H", and ask you to examine them and state to the Court whether these are the policies of insurance upon which these actions were founded?

A Yes, sir.

Q These policies were issued by these companies and delivered to these companies, were they?

A Yes sir.

Q For the identical consideration named in the policy?

A Yes sir.

Q Were these policies in full force at the time this vessel sunk?

A Yes.

MR. GORHAM: We object, as calling for the conclusion of the witness.

Q There has been no attempt on the part of these companies to cancel them for any reason?

A No sir.

Q I notice that the thirteenth clause of each one of these policies is as follows: "If there be an agent or surveyor of the insurers located at or near any place where repairs are made, or proofs of loss or average taken, said agent or surveyor must be represented on the surveys, if any be held, and all bills for repairs, or proofs of loss or average, must be certified to by him, or they will not be allowed by this Company." Was it in pursuance of this

thirteenth clause in these three insurance policies that you notified Captain Gibbs?

A Yes sir.

Q And was it in pursuance of this clause that you had Captain Gibbs, or his deputy, Captain Genero, O. K. these vouchers for the expense of salvaging the vessel?

A It was.

Q I call your attention to what purports to be the cost of raising and docking and overhauling the Vashon, preliminary to the survey, for the purpose of determining the loss, numbered from and identified as Exhibits D-1, D-2, D-3, D-4, D-5, D-6, D-7, D-8, D-9, D-10, D-11, D-12, D-13, D-14, D-15, D-16, D-17, D-18, D-19, D-20, D-21, D-22, D-23, D-24, D-25, D-26 and D-27, and ask you to examine these exhibits and state whether or not they represent correctly the actual outlay for the raising, floating and docking and preparation of this vessel for the final survey made by Captain Gibbs and Mr. Walker?

A Let me ask you a question. Are these supposed to be all of them?

Q Those were the ones that were given to me.

A I can identify them as far as they go.

Q That is the list of them?

A Yes, I guess that's all right. Yes, those are all bills we incurred pertaining to the salvaging of the Vashon.

Q Those sums were paid out by you or by this libellant?

A By the Independent Transportation Company.

Q Aggregating?

A $3964.80.

Q Does that include that? (indicating voucher).

A Yes sir.

Q That includes the item of $225 for services of Frank Walker, marine surveyor?

A Yes.

Q With the exception of that voucher, all the other vouchers referred to contain or have stamped upon them

the approval of either Captain Gibbs or Captain Genero, surveyor for the marine board of underwriters?

A Yes sir.

Q Were there any other expenditures?

A Nothing that I know of excepting that list. These three don't appear to have any approval on, this one of Walker's and that one of the $10 for storing dock, this $150 from Sloan Brothers for the storage of the Vashon.

Q What was this item of $10 to the City of Seattle?

A That was for mooring her out at the buoy.

Q At the City's buoy?

A The City's buoy, yes.

Q During what period of time?

A The City's buoy, the sum of $10. Let me see the Crosby Tow Boat Company bill, that may give the date. "Shifting Steamer Vashon from Albers dock to the buoy." That was on the 14th. Delivering steamer and return to buoy again on the 15th. She was taken over there, then brought back, then taken over again.

Q That was in the month of February, was it?

A in the month of February.

Q The other item?

A The other is $150. That is settlement for storage of the Steamer Vashon, part of the Sloan contract.

Q When, what dates?

A From May 27th to August 27th.

Q That was between the date of the survey and when the vessel was sold?

A Yes sir, that was the final payment made, although we made a contract with them for the hauling out and the storage of the vessel. I don't remember the exact price of that.

Q Did you have any other insurance on this vessel than these three policies?

MR. GORHAM: We object as immaterial and irrelevant.

A Yes, we had insurance with the Fireman's Fund and I think one other company besides those three.

Q These three policies aggregated $9,000. You had in addition to that $6,000 of other insurance?

A Yes, an aggregate of $15,000.

Q Were the other companies members of the marine board of underwriters at San Francisco?

A Well, I know the Fireman's Fund was. I can't say positively as to the other. I have forgotten who the other was.

Q Did they settle their proportionate part of the loss?

MR. GORHAM: We object as immaterial.

Q (continuing) Including their proportionate part of the cost of salving the vessel?

Mr. GORHAM: Same objection.

A Yes, they did.

Q Including the fees of Captain Gibbs as surveyor?

MR. GORHAM: Same objection.

A Yes sir.

Q When did you first learn that the damage to this vessel by reason of her sinking was an amount in excess of fifty per cent of her value, before or after the survey was made?

A We never knew definitely until the survey was made just what the damage was.

Q Now, as soon as you ascertained from the survey what the damage was, what did you do?

MR. GORHAM: We object as incompetent, irrelevant and immaterial.

Q What did you instruct Johnson and Higgins to do?

A We instructed Johnson and Higgins to tender an abandonment of the ship to the underwriters.

Q Have you any personal knowledge of when that notice of abandonment was given?

MR. GORHAM: We object as not the best evidence, because it speaks for itself; it is in writing.

A We notified Johnson and Higgins on the day that we received the survey, which was, I think, the 15th of April, and they notified the underwriters either directly here, or in cases where they were not represented here, through their San Francisco office, the following day.

Q How long had the libellant owned this vessel prior to the time they took out this insurance?

A We took out that insurance immediately after we became owners, as soon as we could take it. We applied for it as soon as we became the owners of it.

Q What did you pay for the vessel when you bought it?

A $12,500.

Q And what expenditures did you make on her up to the time this insurance was taken out?

MR. GORHAM: We object as immaterial.

A We spent between $4000 and $5000 on her in improvements and betterments.

Q Up to the time she was lost?

A Yes.

Q You bought her here in the open market, did you?

A Yes sir.

Q After this survey was made what became of the Vashon?

A She remained on the ways at Sloan Brothers' yard there until August. We finally succeeded in selling her in August. I don't know what became of her after that.

Q What negotiations, and under what arrangement, if any, were any negotiations made for the sale of this vessel, after she was put upon the ways by Sloan, after she was opened up and her engines—

A We consulted with Captain Gibbs and Frank Walker as to what was the best thing to be done. We all agreed the only thing to be done was to sell her. We all went to work with the idea of trying to find a buyer for her. We took the matter up with other steamship people. For one,

I know that Mr. Guyan was approached, I think by Captain Gibbs. I think he went so far as to send a man down to examine her, but nothing ever came of that.

Q What was she finally disposed of for?

A $7050.

MR. GORHAM: We object as immaterial.

Q Was that the valid value of her, in your judgment.

in her damaged condition?

MR. GORHAM: We object as incompetent.

A That was the best offer we were able to get for her. We considered it a good thing to sell her.

Q Was she sold with the knowledge and consent of the underwriters?

A Yes.

Q What effort, if any, did Captain Gibbs make to ascertain the cost of her repairs, of repairing the vessel?

A Why he and Mr. Walker prepared plans and specifications, what was necessary to repair the vessel, and those plans and specifications were submitted to at least two, if not more repair shops, and two of them bid on the work.

Q I call your attention to two letters, each bearing date April 27, 1908, from the Heffernan Iron Works, and one of April 16, 1908, from Hall Brothers Marine, Railway and S. B. Company, both directed to Captain S. B. Gibbs, San Francisco Board of Marine Underwriters, Colman Building, Seattle, Washington. I will ask to have them marked for identification Libellant's Exhibits "F" and "G". I ask you to state whether those are—

A The original bids that we obtained there.

Q These respective companies took the repair of that vessel upon the specifications of Captain Gibbs and Mr. Walker?

A. Yes sir.

Q Did you receive those from Captain Gibbs?

A. Yes sir.

Q Was it after the receipt of these letters that you undertook the sale of the vessel in her damaged condition?

A Yes sir.

Q What was the condition of the vessel after she was hauled out so she could be examined by Mr. Sloan?

MR. GORHAM. We object, same objection.

A She was full of mud and dirt and oil and generally in a very filthy condition both as to her hull and her main deck and more or less in the cabins. The furniture was practically all ruined with the mud.

Q I note that one of these bids, Exhibit "F," is for the sum of $14027.00, for repairing the Vashon, provided the Heffernan Engine Company was given four months in which to do the work. The other bid of the Hall Brothers Marine Railway and Ship Building Company for $23500, provided the work was done within sixty days?

A Yes sir.

Q Did you regard these bids in the light of the damage to the vessel, as being a fair and reasonable amount for the repair of that vessel within that time limit, or as good bids as you were able to get?

MR. GORHAM. We object as incompetent.

A Those were as good bids as we were able to get at that time, in fact the only bids we were able to get.

MR. KERR. I offer these in evidence as Libellant's Exhibits "I" and "J."

MR. GORHAM. We object as incompetent and immaterial.

Q Now, were you able to secure from Captain Gibbs or Captain Gibbs and Mr. Walker, any estimate of the cost of repairing this vessel, or the extent of the damage to her until the survey was made?

A No sir.

MR. GORHAM. We object as immaterial.

Q Through whom were the proofs of loss made to these underwriters?

A Through Johnson and Higgins.

Q Was ever any objection made to your company, the libellant in this case, as to the character of the proofs of loss after they were made?

A None to my knowledge.

Q The loss has never been paid by any of these defendants?

A None by these three companies.

MR. KERR. I want to offer these three policies. Exhibits "F," "G," and "H."

Q Are those policies in the same condition now as when you received them from the company?

A What do you mean, same reading on them or same writing?

Q Are they in the same condition for all purposes of the contract?

A So far as I know, yes sir.

Q After this vessel sunk while these preliminary steps were being taken to raise her, get her out where she could be surveyed and examined, what knowledge, if any, did J. M. E. Atkinson and Company, or Mr. Tomlinson, representing that company, and Mr. J. R. Mason, representing the Canton, have of what was being done towards salving the vessel or determining the extent of the damage to her?

A They were in constant touch with Captain Gibbs, both of them, consulting with him more or less about the matter.

Q Were you present when Tomlinson and Mason had a conversation with Mr. Shuback in regard to the damage to this vessel and the attitude of their companies with reference to it?

A I was present at one conversation between Mr. Shuback and Mr. Tomlinson. Mr. Mason was not present.

Q Do you remember when that was with reference to the time this survey was made, before or after?

A Before, it was made before the survey was made. It was soon after the accident in the first place.

Q Was Captain Gibbs then acting in connection with your surveyor, Mr. Walker, with reference to the raising of this vessel?

A Yes sir.

Q What was that conversation?

A Well, in discussing the matter in a general way, Mr. Shuback asked Tomlinson what was the attitude—what would be the attitude of his company in connection with that loss. Tomlinson volunteered the information that his company would not stand on technicalities, if the loss proved to be a right and proper one, that they would settle.

Q When did you first learn, or your company, that these three companies denied liability on these policies? How long after the proofs of loss had been furnished?

A I don't think that they definitely denied liability until about the time the adjustment was made. There was some question as to whether or not they would accept the abandonment. My recollection is they were waiting to see what attitude the Fireman's Fund of San Francisco was going to take and they led us to believe they would be governed largely—

MR. GORHAM. We object to the conclusion as to what was done. Let him state what the talk was and the talks will show if they led anybody to believe anything or not.

Q Just state what they said, if you remember?

A I can't give you the definite conversation in so many words, but my recollection is that they said they would be largely governed by the action of the Fireman's Fund at San Francisco, and the matter was staved off from time to time. We couldn't get any definite answer from them as to whether they would or would not pay.

Q Why did you not give notice of abandonment prior to the time this survey was made?

A We couldn't very well give notice before the survey was made, as we didn't know the extent of the damage.

CROSS EXAMINATION.

BY MR. GORHAM.

Q You say that this vessel was bought in the open market by the Independent Transportation Company. What did you mean by that?

A I don't know what you might construe the open market.

Q I am asking you what you mean when you used that language?

A Well, that the vessel was for sale. She could have been possibly bought by anybody. She had been there for sale for sometime, I believe, and we came along and bought her.

Q Why didn't you go to the agent with whom you negotiated the insurance instead of the surveyor at the time of the loss?

A It has always been our custom at all times to notify Johnson and Higgins, who act as our brokers, and the surveyors. We have never, to my knowledge, notified any agents direct.

Q And Johnson and Higgins being your brokers, corresponded with the underwriters and their agents in reference to the loss of this vessel, did they not?

A You mean they would be acting as our agents in the matter?

Q Yes?

A Yes sir.

Q Do you remember that the Canton, for instance, advised Johnson and Higgins, as your agents, as early as April 24th that they denied any liability under that policy, in writing?

A As early as April 24th?

Q Yes, April 24, 1908?

A That would have been after the survey was made.

Q I am asking you if you remember?

A I don't remember. I don't think I saw those letters. They may have done so.

Q Do you remember whether or not Johnson and Higgins requested the consent of these insurance companies to the sale of the vessel, requested it in writing?

A I don't know whether they did or not.

Q Do you remember what reply—if they did so request in writing, do you remeber what reply these insurance companies gave to your agents, Johnson and Higgins, in response to that request?

A No sir, I don't. I might say, for your information, when Johnson and Higgins handled these things for us, they attended to all of the details. We were not always advised of everything that they did. We left the matter entirely with them.

Q When you stated that the vessel was sold with the knowledge and consent of these underwriters, did you mean these companies?

A I made that statement. We were so informed by Johnson and Higgins. I didn't make it in that way, though. That is where I got the information.

Q You were informed by Johnson and Higgins—

A That the companies had consented to the sale.

Q These particular companies, these respondent companies in this law suit?

A They said "the companies." I presumed they meant all the companies.

Q The Canton and the Yang Tsze you didn't know?

A I presumed so.

Q I believe you stated this morning that you did visit the vessel prior to her sinking?

A Yes sir.

Q She had been moored there by Captain Warner?

A Yes sir.

Q Acting as your captain?

A Yes sir.

MR. KERR. I offer Exhibits "D-1" to "D-28" in evidence.

MR. GORHAM. We object to the same as incompetent and immaterial.

Witness excused.

ADJOURNMENT TAKEN TO BE RESUMED IN PURSUANCE OF AGREEMENT.

Seattle, Washington, November 14, 1910.

Continuation of Proceedings.

PRESENT: Mr. Kerr, for the libelant.

Mr. Gorham, for the respondent.

The respondent, China Traders Company, limited, waives any benefit accruing to it by reason of the failure of the Independent Transportation Company to commence the above entitled action, case No. 3849, within the term of twelve months next after the accruing of the loss. A stipulation to that effect having been entered into between the principals.

MR. FRANK WALKER, recalled on behalf of the libelant, testified as follows:

Q (Mr. Kerr). State your full name to the Court?

A Frank Walker.

Q What is your occupation?

A Marine surveyor.

Q What was your occupation on December 15th, 1907?

A Marine surveyor.

Q Were you acquainted with the stern wheel steamer Vashon?

A Yes sir.

Q How long had you known that steamer prior to the time she sank in the Duwamish river December 15th, 1907?

A I can hardly say. I had known her for some years.

Q Do you remember about the time she sank in the Duwamish river?

A Yes sir, I do.

Q How soon after she sank did you examine her?

A The next day, the day after, I think.

Q By whom were you employed to examine the vessel?

A By the owners, the Independent Transportation Company.

Q What time on the 16th of December did you first see her?

A Oh, I could not answer that. I do not remember what hour in the day.

Q Did you see her more than once that day?

A I saw her as the tide would allow.

Q Did you examine her in connection with Captain Gibbs, the evening of the 16th?

A I did.

Q What was the stage of the tide then?

A I think it was about half tide.

Q Did you observe at that time, or any other time before the work of raising was commenced, the manner in which she was moored?

A Well, it was hard to determine the manner in which she had been moored.

Q Did you observe any lines?

A Oh yes, there were numerous lines. I did not take any special observation of them, only to note what were out at the time, and see if she was held properly at the time.

Q How was she lying at the time you observed her?

A She was lying with her head up stream, her stern at the bank, the starboard corner of the wheel on the bank; the forward part of the vessel was under water.

Q Calling your attention to libellant's exhibit "C," which purports to be a report of thesurvey of the Vashon,

and specifications for repairs. I will ask you to state whether that is your signature attached to that exhibit?

A Yes sir, that is my signature.

Q Did you participate with Captain Gibbs in making that survey and these specifications for repair?

A I did.

Q The matters and things set forth in that certificate are true?

A Yes sir.

Q Did you examine this vessel after she had been raised and hauled out of the water by the Sloan Ship Building company?

A I did.

Q Did you examine her hull?

A I did.

Q Did you examine her for the purpose of ascertaining if possible, what caused the vessel to sink, for any evidence of what caused her to sink?

A We searched for any causes that might be found to account for her sinking.

Q You heard the testimony of Captain Gibbs with reference to some plugs?

A I did.

Q They were out of the vessel when you examined her. Where were these plugs, did you observe them?

A Yss, I observed these plugs. They were in the inner skin of the vessel and did not extend through the vessel.

Q Did the absence of these plugs on the inner skin of the vessel have anything to do, in your judgment, with the sinking of the vessel?

A No, not unless the outer planking was leaking badly.

Q Did you find any evidence of the vessel having leaked through the outer planking?

A No, no evidence.

Q Were you able to form any opinion as to how the vessel sunk, by reason of her position, when you first discovered her after she sank?

A No, I was unable to form any opinion as to what caused her to sink.

Q You did find one end of the vessel on the bank?

A I found one end of the vessel on the bank. That was the only clue we had. But the mooring might have been tampered with and the vessel's stern swung into the bank.

Q Had you any personal knowledge of heavy wind storms prevailing for a period of say ten or fifteen days, on one or more occasions, prior to the sinking of the vessel?

A I could not say, I do not remember now.

Q After you and Captain Gibbs visited her on the 16th, what, if anything was ordered to be done with her?

A Captain Gibbs and myself agreed on a plan for raising the vessel, and proceeded immediately with that plan.

Q I wish you would just take the steps up in chronological order. State just what you did from that time on until the final survey was made, as shown by exhibit "C"?

A I think the survey report explains that.

Q It explains generally what you found. But was the work of raising the vessel prosecuted continuously?

A It was, as the tides would allow.

Q Was the work of raising the vessel one of difficulty or otherwise?

A It was a difficult performance.

Q In a general way, about what was necessary to be done, and what was done, to raise the vessel in the first place, preliminary to having her hauled out?

A This describes it very clearly. We examined the bottom of the river and the bottom of the vessel. That all openings were made tight. Four sets of dolphins were driven, two forward and two aft, and capped. That heavy cables were passed under the vessel and lead to barges

rigged at each side. That dolphins and necessary scows and pile drivers and tugs were employed.

Q Now have you examined these vouchers for salvage expenses number "D1" to "D29"?

A I do not know the parties, but I examined the vouches and expenses.

Q With the exception of two or three, they all bear the endorsement of yourself and Captain Gibbs?

A I believe they do.

Q Were all these expenses incurred in raising this vessel and hauling her out, preliminary to the final survey?

A They were.

Q Were they necessary expenses?

A Absolutely necessary.

Q Now I see that these expense vouchers bear your endorsement and also the endorsement, with the exception of two or three, of either Captain Gibbs, or Genero. How did you happen to have these expenses O. K'd in that way?

MR. GORHAM. I object as immaterial.

A Captain Genero, acting deputy, and Captain Gibbs, incurred sundry expenses in raising the vessel. He attended the vessel all the time until she was raised for Captain Gibbs, and all expenses incurred by Captain Genero about that time were approved by Captain Genero. Myself for the owners and Captain Genero for the underwriters.

Q Do you remember about the time they succeeded in raising the vessel?

A I do not remember about the dates, Mr. Kerr, they are all set forth in that survey.

Q Assuming that they end about the 11th day of January, did the work of raising the vessel continue from the time they started in until that date?

A Yes sir.

Q How soon did they start in after the vessel sank?

A Started in immediately after Captain Gibbs and myself surveyed the vessel.

Q Now after they completed her raising and moored her, then what was done?

A Then we made arrangements to haul the vessel out; haul the vessel out of the water for the purpose of survey.

Q Did you participate in the negotiations for a place at which she could be hauled out, and in the arrangements for hauling her out?

A I did.

Q It appears that the vessel was hauled out by Sloan & Company?

A Yes sir.

Q Did you know when the negotiations began with Sloan to haul the vessel out?

A I do not.

Q About how soon, in your judgment was it after she was floated?

A As soon as the vessel was floated, Captain Gibbs, myself and owners conferred as to what was best to do. It was decided to find a place to haul her out of the water immediately, and steps were taken to find any firm that would haul her out. And, if I remember right Sloan was the only one that could give satisfactory terms.

Q Was it practicable to undertake to put her upon a regular dry dock?

A The expenses would have been too great.

Q Now, after the contract was made to give Sloan the job of hauling her out, what did his firm do with reference to hauling the vessel out, so that she could be surveyed?

A His firm immediately went to work to build ways in their yard near the Albers mill.

Q Then did they undertake to pull her out?

A Yes, on these ways.

Q Do you remember the occasion when Captain Genero

Q Then What happened?

A I think they rather underestimated the weight of the vessel. They had great difficulty in getting her out

of the water. They got her partly out and then notified us that she was hauled out ready for survey. We examined her as she was partly out, and found we could not make the survey, the stern was still in the water. They reconstructed the ways. They jacked the vessel up and constructed ways and eventually hauled her out high and dry.

Q How soon after you got her out of the water did you make the survey?

A We made our survey as soon as possible.

Q Did you and Captain Gibbs and Captain Genero, while the vessel was stuck on the ways attempt to make any investigation?

A Oh, we attempted to make an investigation a number of times.

Q What was the condition of her hold?

A The hold was in a very terrible condition, just as set forth in the survey report, full of mud and oil, especially fuel oil.

Q Do you remember the occasion when Captain Genero attempted to go into the hold of the vessel with a lantern?

A I do.

Q What occurred?

A Both Captain Gibbs and myself warned him to come out, that it was dangerous to put a light into the hold.

Q Why?

A On account of the gases given off from the fuel oil.

Q Were you able, either you or Captain Gibbs, or both of you, to determine the extent of the damage to this vessel until the survey was made?

A Not until the survey was made.

Q Were you cognizant of the negotiations that went on for a sale of the vessel in her damaged condition.

A It was.

Q Do you remember when it was sold by Captain Gibbs for $750?

A Yes sir.

Q What in your judgment as to whether the sum realized for the vessel was a fair, reasonable value of the vessel, in her damaged condition?

MR. GORHAM. I object as immaterial.

A I considered the price was fair and reasonable, as she was fit for nothing but junk.

CROSS EXAMINATION:

Q (Mr. Gorham). What became of the vessel?

A She was sold to a man by the name of Rubenstein.

Q What became of her?

A I did not follow her after that.

Q Is she still afloat?

A I could not say. I have lost sight of her.

Q You saw these plugs you found in the inner skin of the vessel?

A Yes, they showed in the ceiling of the vessel.

Q Well, there was a space between the ceiling and the hull proper?

A Yes, the thickness of the frames.

Q And if the plugs were in the ceiling of the vessel, that would still permit the water to run in through the hole, would it not, through the holes made for the plugs in the hull?

A There were no plugs in the hull, no holes in the hull?

Q No holes in the hull at all?

A No sir.

Q Then Captain Gibbs is mistaken?

A Captain Gibbs is quite correct. There were plugs in the ceiling of the vessel. There were holes where the plugs had been in the ceiling of the vessel. They did not extend through the outer planking of the vessel.

Q There were plugs put from the inside?

A Yes sir.

Q And not from the outside.

A Not from the outside.

Q And not extending through the outside plank?

A No, not extending through that.

Q Did you and Captain Gibbs—did you call Captain Gibbs' attention to the fact that these plugs were in the ceiling of the vessel?

A I did, when we were making the survey.

Q That is April 15th?

A No, we made the survey, we completed it on April 15th, it took us sometime to make the survey.

Q When did you first call Captain Gibbs attention?

A At the time we were examining the vessel to find out her general condition, what was wrong with the vessel.

Q Where was she then?

A On the Sloan ways.

Q You made no examination in reference to these plugs while the vessel was in the Duwamish river?

A Yes, I made a casual examination at that time.

Q What did you find then with reference to the plugs?

A I found at that time that the diver was under the impression that these plugs went through the vessel, and these plug holes went through the vessel, and had plugged that up before raising the ship.

Q That he had plugged that up?

A Yes.

Q He had plugged that up?

A He had.

Q Inside or outside?

A Inside.

Q Did you ever see the plugs away from the ship, did you ever see the plugs in Captain Gibbs office?

A No sir.

Q What was the size of the plugs?

A I could not say now. They might have been an inch and a half.

Q How many were there?

A I could not say. I did not take any notice, because it was not material at all, so far as the sinking of the ship was concerned.

Q You say that all the items of expense approved by Captain Genero were incurred by him?

A Incurred by him under our approval.

Q Well, what I want to find out is, whether the owners, through you, directed and authorized these expenses, or whether the owners stood by and let somebody else do it?

A No, the owners authorized them through me.

Q Then these expenses were authorized by the owners?

A Most decidedly they were.

Q So that you did not mean to say, when you testified, that all the expenses approved by Genero were incurred by him, that he initiated?

A They were incurred by Captain Genero, approved by Captain Gibbs for the underwriters, and approved by me for the underwriters (owners).

Q You mean by incurred, you say the owners incurred the expense?

A Captain Genero was authorized to raise that vessel, to superintend the raising, all the raising operations.

Q By whom.

A By the owners and underwriters representatives.

Q How do you know he was authorized by the underwriters.

A By the action of Captain Gibbs.

Q That is all you know about it?

A Yes sir.

Q He was also authorized by the owners?

A Yes, through me.

(Testimony of witness closed).

Hearing adjourned, to be resumed by agreement of Proctors.

Seattle, Washington, December 6, 1910.

Continuation of Proceedings.

PRESENT: Mr. Campbell and Mr. Kerr, for the libelant.
Mr. Gorham, for the Respondents.

FRANK G. TAYLOR, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q (Mr. Campbell). Where do you live?

A Seattle.

Q What is your business?

A Marine Insurance.

Q What company do you represent?

A Fireman's Fund Insurance Company, of San Francisco.

Q How long have you been engaged in the marine insurance business?

A Fifteen years.

Q Whereabouts?

A Tacoma, Seattle.

Q Approximately what volume of Marine Insurance do you write in your office here, a year?

A You mean premiums?

Q Give it both in premiums and in valuation?

A We wrote twenty-three millions last year in volume. Premiums $183,000.

Q Can you give us approximately the proportion of hull insurance in that total of twenty-three millions?

A No, I could not; I could not separate it.

Q Well, as far as your recollection of your business goes at the present time, how large a hull business do you write?

A I should say about a half of that.

Q On what classes of vessels.

A All classes of vessels.

Q What are the various steamship vessels doing business on Puget Sound that you cover?

A Well, I have covered pretty nearly all of the vessels out of Puget Sound at times.

Q Are you familiar with the so-called San Francisco form of the hull time policy?

A Yes sir.

A Are any of these vessels on Puget Sound covered by the policies?

A Yes sir.

Q Is it customary for the marine underwriters on the Pacific Coast, to hold vessels covered while laid up which are insured in the San Francisco form of the Hull Time policy, when there is no provision in the policy for the return of the premium?

MR. GORHAM. I object as immaterial and not addressed to the issues in this case. If counsel desires to interrogate the witness in reference to the policy itself in issue, I have no objection.

A I should say it was.

Q Has that been your experience or not?

MR. GORHAM. I renew my last objection.

A It has been my expeerience.

Q I hand you libelant's exhibits "F," "G" and "H," and ask you whether or not these policies are the so-called San Francisco Hull Time Policy?

A I would say that they were.

Q What would be your answer to the question previously propounded as to the custom with reference to a vessel insured under these policies?

MR. GORHAM: Which particular question?

MR. CAMPBELL: The question I asked with reference to the custom on this coast, where there is no provision for return of premium, and no demand made.

A You are talking of course about my own office?

Q I ask what your understanding of the custom is?

A We would consider that they held covered.

Q How does the volume of business done by the Firemen's Fund Insurance company on this coast compare with the total Marine insurance written by companies having offices on the coast.

A That is a rather difficult question to answer. According to the reports made to the Insurance Commissioner, our volume of premiums shows $183,000.

Q That is in this State, through your office?

A Yes. As against the total for authorized and unauthorized companies of $521,000.

Q How many other companies are there in that list of authorized and unauthorized?

A About twenty five.

CROSS EXAMINATION.

Q (Mr. Gorham). When you testified on your direct examination, in answer to interrogatories by counsel, that under these particular policies, exhibits "F," "G" and "H," you considered the vessel coverel while laid up, had you prior to that time ,examined particularly each of these policies, to see the terms and conditions and endorsements on the policies?

A Nothing only as to the form of the policy.

Q That is the printed form?

A The printed form of the policy.

Q That is excluding any endorsements that might be on?

A Certainly.

REDIRECT EXAMINATION.

Q (Mr. Campbell). I will ask you to examine these policies closely, Mr. Taylor.

A And what?

MR. CAMPBELL: I presume you will admit, Mr. Gorham, that the three policies are the same except as to amounts; the provisions of the policies are the same?

MR. GORHAM: I think they are practically identical, with the exception of the amounts in the case.

Q I want you to read them over, so that you know what the policies contain. And then I have another question to ask you.

A All right.

Q Now leaving out of consideration the endorsement which appears on this policy, the vessel warranted employed in the general passenger and freight business on Puget Sound within a radius of thirty miles from Seattle; not considering that, leaving that out of consideration, this warranty endorsed on this policy, I will ask you whether or not, under the custom prevailing among marine underwriters on this coast, of which you have testified, that the vessel insured by this policy would be held covered while she was laid up?

MR. GORHAM: I object. He has not testified there was such custom. He testified his company would so consider.

Q (Question read to witness). Leaving out of consideration that endorsement on the policy.

A I would say it would be customary to hold that vessel covered while she was laid up under that policy.

Q That is in accordance with the custom of marine insurance on this coast, as you understand it?

A That is what I would say, as I understand it.

MR. GORHAM: I move to strike the testimony with reference to custom, because there is no special custom pleaded, and the action is brought on a written contract.

MR. CAMPBELL: I desire the record to show that application will be made in due course, to amend the pleadings, so as to show the custom?

Q (Mr. Gorham). Do you mean, Mr. Taylor, that your company would pay a loss voluntarily under such conditions as has been put to you by counsel, or do you mean to say that the company would be obligated, as a

matter of law, to pay the policy for a loss while the vessel was laid up?

A I do not believe the question would ever arise.

Q Then you don't know what it would be.

A I do not believe we would ever bring the question up.

Q That is not what I ask you, whether you would bring it up.

A I will answere that another way then. I say I think they would pay the loss without question.

Q It might pay the loss without question, but would they consider themselves legally bound to pay the loss?

A I would think so.

Q Under what provision of the policy, excluding the endorsement named, would you be legally bound?

A Well, it is customary for all vessels to lay up for repairs or for overhauling. It is a custom to allow a certain proportion of the premium to be returned to the assured, by reason of the vessel having been laid up, because after, as a rule, we consider the vessel is a better risk and is not subject to the same risk laid up.

Q It is a different risk.

A It is a different risk, yes.

Q Now, when they want to lay up, to get a rebate or return of premium, they make application, don't they?

A Under the San Francisco form of policy they make application.

Q They give notice of laying up, don't they?

A In order to get premiums?

Q Yes.

A They should have to give notice.

Q It is usual to give notice in order to avail themselves?

A It is usual to give notice that the vessel is laid up in order to get the return.

(Testimony of witness closed).

CAPT. FREDRICK WARNER, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q (MR. KERR). State your name?

A Fredrick Warner.

Q Where did you reside in December 1907?

A Seattle.

Q What is your occupation?

A Master Mariner.

Q How long have you been a master mariner, captain?

A Oh, about 16 years, I guess.

Q How long have you followed that avocation in and about Puget Sound waters and the Pacific ocean?

A Well, I have followed that on the coast here that length of time. Been altogether here twenty three years.

Q Name some of the vessels of which you have been master?

A The Ohio, Oregon, Pennsylvania, the C. D. Lane, the Blanchard, and others.

Q Were you acquainted with the stern wheel steamer Vashon?

A I was.

Q Did you have anything to do with the mooring of the Vashon about the 1st of December 1907, in the Duwamish river.

A I did.

Q What did you have to do with the laying up of that vessel, captain?

A I went up and moored her; superintended making her fast.

Q Captain, I call your attention to a blueprint purporting to be a map of township 24 north, range 4 east, King County, and purporting to show the location of the Duwamish river with reference to Elliott Bay. And I have had it marked libelant's exhibit J for identification. I will ask you to indicate on that blueprint at about what

place in the Duwamish river you moored this vessel. Mark it with the letter M?

A This is the place right here in this bend.

Q At the point you indicate on this blueprint with the letter M, right below the figures "30"?

A Yes, that is it right here.

Q How did you take her up, captain, with a tug?

A Towboat, yes sir.

Q Under whose direction was the steamer moored there in the Duwamish river?

A Under mine.

Q I find in the proofs of loss with reference to this steamer, an affidavit to which I call your attention, which I have had marked libelant's exhibit K for identification, purporting to be your own affidavit. Is that your signature to that affidavit?

A Yes sir.

Q Did you make that affidavit for the purpose of it becoming a part of the proofs of loss?

A Yes sir.

Q Attached to this affidavit, captain, I find a diagram in lead pencil, purporting to be a diagram showing the manner in which the vessel was moored. Did you prepare that diagram?

A I did.

Q Is that a correct diagram showing the mooring of the vessel in the Duwamish river?

A Yes sir.

Q The bend of the river indicated on that diagram, is the bend of the river marked by the letter M on exhibit J the blueprint, to which I call your attention?

A Yes sir.

Q Will you now state to the Court, captain, if you please, the exact manner in which you moored the vessel?

A Well, there were piles driven up there, I should

judge about 20 feet from the bank. I took her up alongside these two piles, and I put out forward, two bights around the pile forward, of the forward chock, and the same in the aft chock on the starboard side. Then I ran an anchor out from the port bow, out in the stream with a four and a half inch line on, and I ran another line ahead to a pile over the starboard bow.

Q What was the size of that line?

A That line was a five inch.

Q What was the size of the lines that you fastened to the piling aft?

A They were five inch.

Q What condition were they in?

A Good condition. The lines were good.

Q Captain, about what is the rise and fall of the tide at that point in the Duwamish river?

A About nine or ten feet.

Q What was the stage of the water in the Duwamish river at the time you moored this vessel?

A It was about three quarters flood.

Q And what was the depth of water in which she was moored?

A We had 18 feet.

Q About what did the vessel draw?

A She was drawing then about three feet and a half.

Q And it was about half tide when you moored her?

A It was more than half tide.

Q Was she moored, in your judgment as a master mariner, in a safe manner?

A Yes, she certainly was. I ran a line aft to the pile from the starboard quarter, which came in shore, to the pile right astern. I ran another line from the port quarter right to that same, and would leave that in a straight line with the line of the ship. And one from the starboard quarter lead over toward the port side of

the steamer's stern, so that it all had a tendency to keep her off from the piles as much as possible.

Q How were these lines fastened on the vessels?

A Chocks. Forward they were fast in the chocks, and she had good chocks in her—some call them bits—

Q Were these lines fastened under your direction?

A Yes sir.

Q Did they allow for the movement of the tide?

A The only lines we had to allow for the motion of the tide were the lines we sent around the pile, the bight, they were slack enough to slip up and down the pile.

Q Did you leave anybody, captain, in charge of the vessel as watchman?

A Yes sir.

Q What was his name?

A Faber.

Q Where did he reside with reference to the place the vessel was moored?

A He lived about 200 yards astern of the ship, in a boat house there.

Q He was operating a boat house there?

A Yes, his boat house was there and he lived there, and he had a couple of men working there.

Q Were there any other vessels moored in the vicinity of her?

MR. GORHAM: I object as immaterial.

A Yes, there were schooners around there. The Venus a little ways to the stern of the brick yard there.

Q Was that, in your judgment, a safe place in which to moor the vessel?

A She was in the bend there and did not catch the full force of the tide there.

Q Do you remember of a heavy gale of wind blowing from the south about the 4th of December, three days after you moored her?

A Yes, we had a couple of heavy gales about that time.

Q About what was the velocity, do you remember, in your judgment?

A Well, they climbed up over sixty odd miles an hour.

Q Did you see this steamer again on the morning of the 15th of December?

A I don't exactly remember the date. Somewheres around there, I went out.

Q Is the date correctly specified in that affidavit, subscribed and sworn to on the 20th day of December 1907?

A Yes, it would be right at that time.

Q The 15th.

A Yes.

Q What was her condition as to being moored in good shape on the morning of the 15th of December, the last time you saw her before she sank?

A Why, the last time I saw her before she sank she was all right. Everything was intact.

Q Do you remember how long it was after that visit to her that she sank, did you learn that she sank?

A Well, I don't know, two or three days, possibly. I do not remember exactly.

Q She sank on the 16th.

A Yes, somewhere there. The next day then, I guess.

Q Were you there the afternoon of the 16th with Mr. Walker?

A Yes sir.

Q After she had sunk?

A Yes sir.

Q What condition you find her then, Captain?

A Well, I found her down by the head; the lines had been let go.

Q Were any of her lines—

A Some, of course I could not say, because they were

under water. I noticed some of them aft had been let go. Whether they done that after she sunk I don't know.

Q Did you return again on the night of the 16th with Mr. Walker and Captain Gibbs, to go aboard of her?

A Yes sir.

Q What was her position then?

A Same position when the tide was down. Could not see anything on the deck, because they were under water, the main deck.

Q Did you observe her lines then?

A No more than I did the first time.

Q Did you have anything to do with her captain Warner, after she sank?

A No sir.

Q Now, have you at any time observed, and to what extent, if any, these lands about the place where this vessel was moored, were flooded, if at all, at high tide?

A The only time I ever noticed them flooded was when there had been a big freshet.

Q Were the lands on either side of the river diked there?

A No, they were not diked. When there was a big tide there it was just up to the bank.

Q At extreme high tide was this land flooded there around where this vessel was moored?

A No.

Q To no extent?

A Not that I saw when I was there.

MR. GORHAM: I object as leading.

Q Were you ever up there at extreme tide so that you could observe the extent, if any, to which this land might be flooded with water?

A Oh, I have seen it flooded at the time of the freshets, that is all, it is flooded all over then.

Q Have you been up in that vicinity at other times?

A Yes sir.

Q Well, what is the character of this land at the point and below the point, about the point where this vessel was moored, as being tide land or not?

MR. GORHAM: I object as immaterial..

A I would not consider that was tide land. When it came over at the bank, well I never seen it come over the bank there.

CROSS EXAMINATION.

Q (Mr. Gorham). You say there were a couple of gales of wind. When was the first gale that you refer to?

A Well, one followed the other within a couple of days, third or fourth.

Q I mean when was the first, with respect to the time you moored the vessel there, on the same day or the day or the day after?

A After I moored her?

Q Was it after she was moored that the first gale came?

A Yes, it blew a hard gale after we moored her.

Q What time after you moored her, one, two, three days or a week, or when was it?

A As far as my recollection serves me, I think it was about three days, something like that.

Q What direction did the wind blow?

A South east; south. Southeast, south, veered around toward the southwest.

Q When had it reached the highest velocity, in the west?

A Well, I would not be sure about that. I think it was when it was in the south.

Q How long after that first gale was the second gale that you refer to?

A One followed the other pretty close, about a day, I think it was.

Q And what direction did the wind blow from then?

A Same direction.

Q What direction was it blowing when it reached its highest velocity?

A It was from the southward. I cannot say whether it was south, southeast or southwest, but from the southward though.

Q What is the topography of the country immediately to the west of the place where you have marked M on this plat?

A Well, the west would be more up and down.

Q What is the topography of the country immediately west assuming that north is where I have marked N on the plat, what is the country immediately west of M?

A West there would be up and down stream.

Q What is the topography of this country?

A It raises up gradually a kind of a hill.

Q What height does it raise?

A That I would not say.

Q Two or three hundred feet?

A Enough to make quite a little shelter there.

Q You don't know how high that bluff is there?

A No, I do not know.

Q In your affidavit you have a plat attached, and on that plat you have got this place marked "Brick yard" down stream from the Vashon?

A Yes sir.

Q Now is there not a high bluff—

A There is a high bluff back of the brick yard.

Q And that extends north and south to what extent?

A I do not know how far, but—

Q It runs half a mile or a mile, don't it?

A Yes, there is quite a shelter there I know, where the boat was moored, when the wind is from the southward.

Q So the blowing of this gale did not affect this vessel?

A No, she did not blow adrift.

Q You did not attribute her loss to the effect of the gale?

A No, because she was all right after the gale.

Q When you say all right, you mean in respect to her moorings?

A Yes, because I spoke to the watchman to look after her and he told me she was all right.

MR. GORHAM: I move to strike what the watchman said, as not the best evidence, and heresay.

Q Do you know of a third gale blowing, subsequent to the second gale, and before the vessel was lost or wrecked, or were there only two gales?

A There were two, to the best of my recollection.

Q You were the Port Captain of the Independent Transportation Company?

A No, I was working for the Chesley Tow Boat Company at that time.

Q But were engaged by the Independent Transportation Company to moor this vessel?

A Yes sir.

Q The Chesley tow boat company took her up the river?

A Yes sir.

Q She had been lying at the Chesley wharf just before that?

A Yes sir.

Q How long had she been lying there?

A I don't exactly know; a month or six weeks.

Q Out of commission?

A Yes sir. She was laid up. I do not exactly remember the time. I would not state positively.

Q You say Faber was a boat house man?

A Yes, he owned the boat house.

Q Lived in it?

A Lived in it.

Q How many men did he have with him?

A He had two working for him at that time.

Q How long did it take you to moor the vessel after you arrived there?

A Oh, I think I was about two hours, or two hours and a half.

Q How soon after the expiration of the two hours and a half did you leave there, after mooring the vessel?

A I left right away when she was moored fast.

Q That was on the 3rd of December?

A Yes sir.

Q And when did you next visit that vessel?

A Well, I don't know exactly when it was, but I used to have occasion to go up the river several times to the brick yard, and I used to take a look at her.

Q How many times did you go up after the 3rd?

A Before I went there after she was sunk?

Q Yes, between the time you moored her and the time she was sunk?

A I should judge four or five times.

Q How close to the vessel?

A I went aboard of her.

Q How many times did you go aboard of her?

A I went aboard at least three times.

Q How did you go there, in a launch or tug?

A No, I used to walk around until I got to the boat house, and then I would get a boat from Faber.

Q How long a time did you remain each time you were there, approximately?

A Oh, 15 or 20 minutes.

Q Did you ever visit her more than once a day during these times?

A No.

Q So that all you know about the vessel and her condition after you moored her, and after you had gone away on the day that you moored her, was what you saw upon these particular visits that you are referring to?

A Well then, outside of that I would get a report.

Q I am asking about what you personally saw?

A I personally saw she was all right.

Q That is all you know about the vessel and her surroundings and her care, is what you saw yourself.

A Yes.

Q I am now referring to your own personal knowledge.

A Yes sir.

REDIRECT EXAMINATION.

Q (Mr. Kerr): Did the parties left in charge of the vessel, report to you from time to time as to her condition?

A Oh yes.

(Testimony of witness closed).

MR. KERR: I offer in evidence these two identified exhibits.

Papers marked libellant's exhibits J and K filed and returned herewith.

MR. KERR: I have offered in evidence the policies, the affidavits of Warner and Faber; the certificate of registry. And

It is stipulated that the notice of abandonment, the originals of which are attached to the respondents exceptive allegations. The list of damages attached to respondents exceptive allegations, and the three original orders for payment; and the three original letters of transmittal; the proofs of loss attached to respondents

exceptive allegations, may be considered by the court, as a part of our testimony of the proofs of loss, with the same effect as though produced and offered again. I have also offered the surveyors report which is in evidence. And the court may also consider the affidavit of Shay, a copy of which is set forth in the exceptive allegations of the respondent. The Independent Transportation company certifying the correct list of all the insurance on the steamer on the 15th of December, 1907, at the time she sank in the Duwamish river. This is for the purpose of avoiding the calling of Mr. Shay as a witness.

(Hearing adjourned. To be resumed by agreement of proctors).

Seattle, Washington, March 15, 1911.

Continuation of proceedings pursuant to agreement.
PRESENT: Mr. Kerr, for the Libellant.

Mr. Gorham for the Respondents.

GERALD LOWE, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Q (Mr. Kerr). State your full name to the Court?

A Gerald Lowe.

Q What is your business, Mr. Lowe, and what has it been for the last number of years?

A Average adjuster and Insurance broker.

Q With what firm are you connected?

A Johnson & Higgins.

Q How long have you been connected with that firm?

A Since 1900.

Q How long have you been connected with that firm in the city of Seattle?

A Since 1903.

Q Have you had experience during all that period of time in adjusting marine losses?

A Yes sir.

Q Did you act for Johnson & Higgins in attempting to adjust the loss in this case?

A Yes sir.

Q Did you attend to the matter of giving notice to the insurers in this case?

A Yes sir.

Q I call your attention to some documents which I will have marked as libellant's exhibit L for identification, purporting to be one of the original notices of proofs of losses, sent by Johnson & Higgins by yourself, directed to J. M. E. Atkinson, agents of the Yang Tsze Insurance Company, limited, bearing date of April 15, 1908, and will ask you if this is one of the original notices of abandonment given by you, as average adjuster of the loss sued on?

A It is.

Q Was the same character of notice, the same language, given to each of the other Insurance companies?

MR. GORHAM: I object as immaterial, for the reason that the Court has held as the law of this case that the abandonment came too late.

MR. KERR: Independent of that question, will you have any objection to my offering carbon copies of the notices of abandonment, without demanding—

MR. GORHAM: I will agree they were all similar, as far as that is concerned, except as to the amount.

Q Attached to that exhibit is a letter under date of April 17th, directed to you by the Canton Insurance Office, limited. Did you receive that letter in response to the service of notice of abandonment?

A Yes sir.

Q I hand you as part of the same exhibit an affidavit dated April 17th, 1908, purporting to have been executed by A. B. Shea, before Ira A. Campbell, a notary public. Was that one of the original affidavits showing the amount of insurance on the vessel?

A Yes sir.

Q Was that affidavit served with the other proofs of loss upon the insured in each of these cases?

A Yes sir.

Q Did you make any application, Mr. Lowe, at any time, to these respondents for consent to make sale of the vessel?

A Yes sir.

Q Do you remember about the date with reference to August 10th, 1908, when you received the letter from Mr. Mason, bearing that date.

A Yes sir.

Q Calling your attention to certain letters and copies of letters, which I have had marked for identification libellant's exhibit M, I will sak you whether the letter of July 30th, 1908, was sent to each of these Insurance companies, whether the phraseology of the letter, except the figures, are the same in each case?

A Yes sir.

Q Calling your attention to certain carbon copies attached to the letter of July 30th, to the Yang Tsze Insurance Association, bearing date July 29th and July 27th, and whether these carbon copies were attached to these original letters of July 30th, mailed by you to each of the insurers?

A Yes sir.

Q Now I call your attention to a carbon copy of a letter bearing date August 3rd, 1908, directed to the Underwriters of the steamer Vashon, I will ask you if mailed the original of each of these, that is to each of these three insurance companies or their agents?

A Yes sir.

Q About that date?

A Yes sir.

Q I call your attention to original letters from Atkinson & Company, dated August 6th, and from Tomlinson, acting agent of the Yang Tsze Insurance Association of the same date, and an original letter dated August 10th, 1908, signed by J. R. Mason. I will sak you if these letters were received by Johnson & Higgins in response to the correspondence to which your attention has been called?

A Yes sir.

MR. KERR: I offer these two exhibits identified by the witness in evidence.

Papers marked libellant's exhibits "L" and "M"' respectively, filed and returned herewith.

Q Calling your attention to the last exhibit under date of August 7th, 1908, directed to W. W. Tomlinson, a letter of August 11th, 1908, directed to Waterhouse & Co., agent of the Canton Insurance Company, I will ask you if these are correct copies of the original letters that you mailed these people on that date?

A Yes sir.

Q How soon, Mr. Lowe, after this vessel sank in the river was your attention called to her, and how frequently did you see the vessel after that time?

A My attention was called to the loss immediately. I never saw the vessel.

Q How frequently were you aboard the vessel after she was raised?

A I was not aboard the vessel.

Q Did you have anything to do in connection with Captain Gibbs in negotiating a sale of this vessel in the month of August 1908?

A Yes sir.

Q What did you do in connection with that?

A I endeavored to secure the underwriters consent to the sale.

Q Were you able to procure the consent of these respondents in this case, the Canton Insurance Office, limited, The China Traders' Insurance Company, limited, and the Yang Tsze Association, limited?

A No sir.

Q What did you and Captain Gibbs do with reference to an attempt to sell this vessel, what negotiations did you have?

A I do not know exactly what Gibbs had to do with the sale. My efforts were confined to procuring and endeavoring to procure the consent of all parties.

Q Did the other co-insurers consent to the sale of the vessel?

MR. GORHAM: I object as irrelevant and immaterial.

A Yes sir.

Q What was the value of the vessel in her then condition with reference to the price at which the vessel was to be disposed of?

MR. GORHAM: I object as incompetent. The witness says he never was aboard the vessel, and he is not competent to testify.

A About $750, that is the damaged value.

Q Were you familiar with the value of the vessel in the condition in which she was in at that time?

A No sir.

Q Market value?

A No sir.

Q What the ship was worth in the market?

A No sir.

Q You left that to the surveyors?

A I did, yes.

Q During your experience, Mr. Lowe, in marine insurance business, have you become familiar with the San Francisco hull time policy?

A Yes sir.

Q You have examined these policies exhibits F, G, H?

A Yes sir.

Q I will ask you to state to the Court whether that is the San Francisco hull and time form of policy, aside from the endorsement?

A That is.

Q Can you state to the Court approximately the volume of business transacted here in Seattle by Johnson & Higgins yearly?

A Premiums?

Q Yes sir, about what premium?

A Oh, about $250,000.

Q Do you know of a custom prevailing among underwriters on this coast with respect to holding vessels covered under the San Francisco hull time policy, while vessels are laid up?

A Yes sir.

Q Under the San Francisco hull time policy, I will ask you whether or not it is customary among underwriters on this coast to hold a vessel covered while laid up without notice of such laying up having been given to the underwriters and the consent to such laying up obtained, where there is no return premium for laying up provided for, nor inspection to be made by the insurance, or not?

A Yes.

Q What is that?

A The custom is to hold the company.

Q Was there any objection ever made to you by any of these respondents in this suit, about the form or character of notice of abandonment?

A No.

Q Or of the proofs of loss that were furnished them by you as adjuster having charge of the adjustment of loss?

A No.

Q Did you furnish each of them with proofs of loss?

A Yes sir.

Q Did you ever get any other response from any of them than that contained in the letters to which your attention has been called here, in which they denied liabiltiy?

A Yes sir.

Q What response was that?

A There are some letters.

Q Referring to these losses?

A Yes.

Q The earlier letter to which you refer is the letter of April 10th, 1908, directed to you by J. R. Mason, manager of Frank Waterhouse & Company, incorporated?

A Yes sir.

Q Your letter which I have had marked for identification libellant's exhibit "N," had reference, did it not, to an agreement, the original of which is attached to it, in which you requested these companies to sign?

A Yes sir.

Q Now did you receive any other letters referring to the adjustment of the loss of this vessel, from any of the respondents, other than those that have been identified here, of which you have any knowledge?

A No.

Q Were any objections at any time made to Johnson & Higgins, or to you, going to the character or extent of the proofs of loss, or the notices of abandonment that was given to you or orally by any of the agents of the parties?

A No sir.

MR. KERR: I offer these papers last identified in evidence. Papers marked libellant's exhibit "N," filed and returned herewith.

CROSS EXAMINATION.

Q (Mr. Gorhom). You say you were notified immediately after the loss of the vessel, of its loss?

A Yes sir.

Q Do you remember when the loss occurred?

A I thing it was on the morning of December 16th, 1907.

Q And what was the date of this notice of abandonment?

A As near as I can recollect it was April 15th.

Q Do you know why four months had elapsed between the date of the loss and the notice of abandonment? What was the occasion of the delay?

A An effort to ascertain whether or not the vessel was a constructive total loss was the occasion of the delay.

Q Was that the only reason?

A So far as I know.

Q Do you know when the vessel was floated?

A She was floated about a month after she sank.

Q Do you remember when she was hauled out and cleaned?

A She was hauled out and cleaned the same month she was floated, the end of January 1908.

Q And how long would it then take after she was hauled out and cleaned, to ascertain the extent of the damage or loss?

A How long would it take?

Q Yes sir.

A Well, it did take until April.

Q Why did it take until April?

A The principal difficulty was that it was impossible to get the agent, surveyor of the Underwriters, to say what the damage was.

Q Why could you not have your own surveyors and abandon this without respect to the Underwriters surveyor?

A It is our practice to get the Underwriters surveyor to join with our surveyor, so that the question of proof on that point is eliminated. We go to great length to get the two parties to act togeher.

Q When they decline to come, what do you do, act independent?

A Then we have the owners surveyors state what the damage is.

Q Why did you delay from the last of January until the middle of April before making an abandonment of a vessel the damage of which was apparent to you on the last of January, she being at that time hauled out on the ways.

A Because the Underwriters surveyor did not decline to state what the loss was. He finally acted.

Q Was there no other reason, Mr. Lowe, for the delay in the abandonment?

A Not so far as I know.

Q I show you a letter dated August 10th, 1907, addressed to Frank Waterhouse & Company, signed by Johnson & Higgins, by you. Is that your handwriting at the bottom of the letter, your signature?

A That is my writing throughout.

Q That letter was sent to the addressee?

A Yes sir.

MR. GORHAM: I desire to have this letter identified.

Paper marked respondent's exhibit "1" for identification.

Q What was the purpose, on August 10th, of the request contained in this letter?

MR. KERR: I object as incompetent, irrelevant and immaterial and long antedating the loss of the vessel.

A For fear that the Katalla company might have a possible interest in the boat, I wished to cover all interests.

Q Why did not you cover the Pacific Coast company's interest?

MR. KERR: I object as not cross examination and as incompetent, irrelevant and immaterial.

A I did not fear they had any.

Q What reason had you to suspect that the Katalla Company had any interest?

MR. KERR: I renew my last objection.

A I was informed that it might have.

Q Were you not informed that they actually had an interest by the assured?

A No sir.

Q The Independent Transportation Company?

A No sir. That note is an extraordinary precaution on my part for fear that in the most remote contingency they might have an interest, I drew that up.

Q Were you not advised prior to the date or the writing of this letter, August 10th, 1907, by the Independent Trans-

portation Company, that they had made a sale to the Katalla Company of the steamer Vashon, and of their interest in the steamer Vashon?

MR. KERR: I renew my last objection.

A No, not that they had made a sale.

Q Were you advised with reference to the pending sale at that time?

MR. KERR: I renew my last objection.

A A possible sale.

Q Were you not advised on or about the 8th of August and prior to your writing this letter of August 10th that the sale had been consummated and that the vessel had been actually delivered?

A No.

Q Were you not so advised by the Independent Transportation Company or some of their agents?

MR. KERR: I make the same objection.

A No sir.

Q Did you address similar letter to the letter of August 10th, 1907, to the other respondents or their agents in this particular litigation, that is to the China Traders and to the Yang Tsze?

A Yes sir.

Q Did they make any answers to these letters?

A My recollection is that they accepted the notice.

Q Will you produce the letters, please.

MR. KERR: I make the same objection.

A I haven't them here.

Q Will you bring them, produce them so that I may have them before the Commissioner?

A Yes, I will.

Q Did each one of them notify you that they would comply with the request, or only one or more?

A My recollection is they all three did.

A Not so far as I know.

Q I show you a letter dated August 10th, 1907, addressed to Frank Waterhouse & Company, signed by Johnson & Higgins, by you. Is that your handwriting at the bottom of the letter, your signature?

A That is my writing throughout.

Q That letter was sent to the addressee?

A Yes sir.

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A My recollection is that they accepted the notice.

Q Will you produce the letters, please.

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A I haven't them here.

Q Will you bring them, produce them so that I may have them before the Commissioner?

A Yes, I will.

Q Did each one of them notify you that they would comply with the request, or only one or more?

A My recollection is they all three did.

Q Then what happened?

A I went away then, and the rest is only heresay. My superior relieved me and withdrew the request.

Q He withdrew the request?

A Yes sir.

Q After it had been granted?

A That is my recollection.

Q Now is it not a matter of fact, Mr. Lowe, that the underwriters declined to comply with the request?

A I am not sure.

Q And after the declination on the part of the Board of Underwriters, that then on August 14th the request was withdrawn? Is not that the fact?

A My recollection is that we had the consent, either verbally or in writing of the companies, and my superior withdrew the request after I left for New York.

Q Who was your superior?

A Mr. W. H. Leboynaton.

Q I show you a letter dated August 16th, 1907, coming from Johnson & Higgins office, Seattle. Is that the withdrawal of the request that you refer to?

A Yes sir.

Q And a similar letter sent to each of the respondent companies in this case?

A That I do not know. I left for New York.

Q Would the copies be among your files?

A Yes sir.

Q In the Seattle office?

A Yes sir.

Q Will you please examine your files and produce them before the Commissioner?

A Yes sir.

Q Now what would be the effect of a request, the request of August 10th, the granting of the request by the Under-

writers, as you say they did, and the withdrawal of the request of August 16th?

MR. KERR: I object as incompetent, irrelevant and immaterial and not proper cross examination.

A Effect in what way?

Q What would be the effect in the granting of the request. To make the underwriters liable to the Katalla company in the event of loss and they had an interest?

A Yes sir.

Q Then what would be the effect if they granted that request and then the request was subsequently withdrawn?

MR. KERR: I object as incompetent.

A I should think the Katalla interest would not be covered.

Q At the time of indicting the letter and mailing the letter of August 16th, 1907, withdrawing the request were you acting for the Katalla Company?

A No sir. That was the reason my superior withdrew the request.

Q On August 10th at the time you made the request, were you acting for the Katalla Company?

A At no time was I acting for the Katalla Company.

Q At whose instance then did you make the request of August 10th?

MR. KERR: I object as incompetent.

A As the servant of the Independent Transportation Company.

Q Did you know of the existence of a lawsuit upon the part of the Independent Transportation Company against the Katalla Company, in the United States Circuit Court, to recover the purchase price of an alleged sale of the Vashon by the Independent Transportation Company to the Katalla Company, in the latter part of 1907 and the early part of 1908?

MR. KERR: I object as incompetent and as not proper cross-examination.

A I do not know of any actual suit.

Q You mean you had not any personal knowledge of it?

A I had no personal knowledge of the filing of papers or whatever you call it.

Q But you were advised by the Independent Transportation Company that such litigation was pending?

A No.

Q Had no knowledge of it?

A Not of any actual litigation.

Q What knowledge did you have with reference to it?

A The same as I said before, that there was a question that they might have some interest. Whether it even went to law or not I do not know.

Q You say some interest, would that be 100 per cent. interest in the vessel or only as part owner or what kind of an interest?

A I do not know.

Q Were you not in consultation with Charles H. Hamilton in reference to the matter of the litigation subsequent to the loss of the vessel?

A Only in that he asked me if there was any possible other interest there and told me to try to cover it under these policies.

Q I am now speaking after the loss of the vessel.

A No.

Q When it became necessary then to abandon or give proof of loss, you had no consultation with the officers or agents of the Independent Transportation Company, with reference to the litigation against the Katalla Company?

A No.

Q Did the Independent Transportation Company, by their direct instructions or otherwise, secure a delay of notice of abandonment, the notices that have been offered in evidence here by the libellant?

Q Did they secure delay, the Independent Transportation Company?

Q Yes?

A Yes.

Q By instruction—did they instruct you to delay the notice of abandonment?

A No.

Q Then in what way did they secure this delay?

A I kept pressing them for Captain Gibbs report as to what her damage was. They told me that they could not get it, so they did secure the delay.

Q Now is it not a fact that after the vessel had been floated and cleaned, hauled out and cleaned the negotiations were entered into by your office looking to the sale of the vessel, then negotiations being before the notice of abandonment?

A Yes sir.

Q And were you not, on behalf of the libellant, negotiating for a settlement by particular average, prior to the notice of abandonment?

A No.

Q You were not?

A No. sir.

Q You are positive about that? Are you positive in your memory, do you think you remember well about that?

A Yes sir.

Q Then it was only negotiations for the sale of the vessel, and not negotiations for settlement of the loss that was pending, before the notice of abandonment was given?

A By particular average?

Q Yes, by particular average.

A It might strictly be called particular average. My object was, instead of measuring the cost of the claim of the underwriters by the repairs, which is the usual particular average method, I tried to measure it by comparison of what the boat was worth sound and what she was worth damaged, and my negotiations looking to a sale—was not a real sale of her but to find out a bid for her in her damaged condition.

Q That was for the purpose of ascertaining the particular average?

A And depreciation.

Q Looking to a settlement of the contract of insurance?

Q And these things were carried on prior to the notice of abandonment.

A Yes sir.

Q Now did you know that on the 9th day of April, 1908, a week before the date of the notice of abandonment, the litigation that I have referred to, between the Independent Transportation Company and the Katalla Company, was dismissed?

A No.

Q Were you advised by the Independent Transportation Company or its officers or agents, of that fact?

A No sir.

Q Did you know it in any other manner, by any other means?

A No, I never knew of any litigation.

Q Did you ever know or hear that the Katalla Company paid the Independent Transportation Company five thousand dollars?

MR. KERR: I object to all this testimony as incompetent, irrelevant and immaterial and not proper cross-examination.

Q On the transaction between them relative to the sale of the Vashon?

A No.

Q Or any other sum?

A I may have heard they paid them some sum as a rumor. I do not remember.

Q Now is it not a fact, Mr. Lowe, that the reason that the notice of abandonment was given as late a date as April 15th, 1908, was because of the litigation pending in the United States Circuit Court, wherein the Independent Transportation Company claimed twenty five thousand dollars and some odd cents, for an alleged sale of the Vashon

to the Katalla Company, and the Independent Transportation Company was not in a position in the court to allege an absolute sale and before the underwriters to claim an absolute loss?

MR. KERR: I want the record to show that I have no objection to counsel making Mr. Lowe his own witness for the purpose of his own case, but I shall insist that in all this examination with reference to matters taking place with the Katalla Company, counsel is making Mr. Lowe his own witness, and will be bound by his testimony. Otherwise I object to the same on the ground that it is wholly incompetent, irrelevant and immaterial and not proper cross examination.

MR. GORHAM: The whole matter goes to the reason for the delay in the notice of abandonment and proof of loss.

A What reason the owners had for not letting it go ahead I do not know, but I was pressing them for this estimate of Gibbs and did not get it until about the 15th of April—that paper was made from the survey, and my notice of abandonment.

Q I will ask you, Mr. Lowe, in reference to the custom of allowing insurance while a vessel is laid up, concerning which you testified, under the San Francisco hull and time form of policy, in giving your testimony you excluded from consideration the endorsements made upon libellant's policies which are exhibits in this case?

A Excluding the endorsements, yes.

Last letter identified by the witness marked respondent's exhibit "2" for identification.

REDIRECT EXAMINATION.

Q (Mr. Kerr): Calling your attention to the letter of August 16th, 1907, respondents identification "2", which is a letter from the office of Johnson & Higgins to Waterhouse & Company, withdrawing the former request made by you on August 10th in the matter of the insurance in controversy herein, I will ask you if any of these insurance companies ever objected to this withdrawal, to your knowledge?

A No.

Q Made no objection whatever?

A No sir.

Q Referring again to your testimony with reference to San Francisco hull and time policy, I will ask you if any of the endorsements upon either of these policies in your judgment, in any manner, affects the custom by which you have testified these vessels were covered while laid up?

A No.

(Testimony of witness closed).

MR. KERR: Libellant rests.

Hearing adjourned. To be resumed by agreement.

Seattle, Washington, August 16, 1911.

PRESENT: Mr. Kerr, for the libellant.
Mr. Gorham, for the respondents.

RESPONDENTS' TESTIMONY.

J. R. MASON, a witness called on behalf of the respondents, being duly sworn, testified as follows:

Q (Mr. Gorham). State your residence, Mr. Mason?

A Seattle.

Q Your occupation?

A At present insurance adjuster.

Q How long have you been in the insurance business?

A Twenty five years.

Q Whereabouts?

A Principally on Puget Sound, Port Townsend, Seattle.

Q What kinds of insurance?

A Fire and marine.

Q And in what capacities have you handled marine insurance?

A Agent for underwriters.

Q Were you at any time agent of the Canton Insurance Company one of the respondents in this case?

A I was.

Q For how long a time?

A About ten years.

Q And what was the scope of your agency and your power and authority and duty, generally speaking?

A Acceptance of risks and payment of claims.

Q Had you any superior officer over you in your agency on Puget Sound?

A No.

Q To whom did you report?

A The general agents of the company in San Francisco, Parrott & Company.

Q What was Parrott & Company, the San Francisco agents?

A They were the United States agents.

Q For what other companies did you act as agent during this time, that is, just generally?

A The Western Assurance Company of Toronto.

Q I show you libellant's exhibit "G," and ask you if you ever have seen that paper before?

A I have, yes sir.

Q Is that your signature at the bottom, J. R. Mason, agent?

A Yes sir.

Q Was the insurance referred to in this paper, exhibit "G" effected through your office at Seattle?

A Yes sir.

Q I notice that the paper "G," which is a Canton insurance Policy on the steamer Vashon, recites that it is executed the 24th day of October, 1904, and then it is countersigned by you as agent on the 5th day of July, 1907. Explain, if you can, how this policy happens to be executed under the date of October 24, 1904?

A The policies are sent to me in serial numbers, from the office of the general agent, who signed them in San Francisco on the date of their—probably on the date of issuance to me, and then upon the issuance of the policy to the assured at any time subsequent to that I countersigned it with the date of issuance.

Q Then this policy was not issued to the Independent Transportation Company on the Vashon on October 24th, 1904?

A No sir.

Q But is of date 5th of July, 1907?

A Yes.

Q The date of your countersigning it?

A Yes sir.

Q What would be the volume of your business, Mr. Mason, the marine business with the Canton Insurance Office, during the years for which you were their agent, approximately, I mean?

A It varied. As high as twenty-eight or thirty thousand dollars in a year. Sometimes less.

Q You mean in premiums?

A Yes.

Q What would be the approximate risks carried under these premiums—to get at a reasonable idea of the volume of your business?

A That would be very difficult to estimate, because a portion of that premium came at a very low rate, such as registered mail business. I suppose it would run upwards of a million, between one and two million dollars.

Q I call your attention to an endorsement on libellant's exhibit "G," the Canton policy "Vessel warranted employed in the general passenger and freighting business on Puget Sound within a radius of 30 miles from Seattle" in typewriting, and then in longhand writing "J. R. M." the initials "J. R. M." who wrote that J. R. M.?

A I did.

Q Are they your initials?

A Yes sir.

Q Now, when was that endorsement placed upon that policy, as regards the date of its execution?

A It was placed on the policy the day the policy was issued.

Q You mean by your office?

A Yes sir.

Q The 15th of July, 1907?

A Yes sir.

Q Not when it came up from the San Francisco office October 24th, 1904?

A No sir.

Q Are you familiar with the construction the assured and the underwriters place upon such an endorsement, as regards the time of its operation?

A Yes sir.

Q What is that construction?

MR. KERR: I object as immaterial.

A The clause means that the assured warrants that the vessel is not and will not, or is and will during the time of the policy, during the life of the policy, be employed as stated in the warranty of the policy.

Q State whether or not it is construed as a condition precedent to the attaching of the policy?

MR. KERR: I object as immaterial.

Q Or whether it is a condition to be in operation in future during the term of the policy?

MR. KERR: I object as immaterial.

A The condition is to be during the entire life of the policy, from the moment of attachment to the moment of expiration.

Q Is that the generally accepted construction of an endorsement in the particular language of this endorsement I have called your attention to in the Canton policy?

MR. KERR: I object as immaterial.

A Yes sir.

Q Do you remember the circumstances of the loss of the Vashon, Mr. Mason?

A Yes sir.

Q When did you first hear of the loss of the Vashon?

A My recollection is that I saw it in the newspapers the morning after it occurred.

Q Do you remember the year and month when the vessel was lost, without my calling your attention to it?

A I think it was in December, 1907.

Q Now how soon after hearing of the loss of the vessel did you take any action on behalf of the Canton Insurance Company in any way?

A I called on Captain Gibbs, I think, on the morning after the loss occurred, to inquire of him the circumstances of the loss and the condition of the vessel.

Q Who was Captain Gibbs.

A Captain Gibbs is a marine surveyor located at Seattle.

Q Is the Canton Insurance Company a member of the board of marine underwriters of San Francisco?

A I understand it is.

Q What relation did Captain Gibbs bear towards the Board of Marine Underwriters of San Francisco?

A Captain Gibbs is the accredited surveyor of the marine board.

Q Do you know what his powers and authority and duties are in such capacity?

A Well, it is Captain Gibb's duty to look after the interests of the Underwriters, in reference to marine losses that come to his knowledge in this district, and report the circumstances and conditions to the companies, and follow their instructions regarding further operations.

Q Is his authority general or does he act on instructions in each particular case?

MR. KERR: I object on the ground that the witness has not been shown to be qualified to answer the question,

or to know what authority the Board of Marine Underwriters in San Francisco gave to Captain Gibbs. This witness was not connected with that board personally.

A He would require specific instructions as to his action with reference to any matter after furnishing the board with his first report.

Q Did you give Captain Gibbs any instructions, as agent of the Canton Insurance Company, with reference to this loss after it occurred?

A Yes sir.

Q What instructions did you give him?

A I instructed Captain Gibbs to take no action on behalf of the Canton Insurance Office, or as their representative, relative to the salvage of that vessel.

Q When did you give him such instructions?

A The morning after the loss occurred.

Q Were these instructions in writing or oral?

A Oral.

Q Where were they given?

A In Captain Gibbs office.

Q Whereabouts?

A In his private room. He has two rooms. He has a general office and then a private room.

Q You mean in the Colman building in Seattle?

A Yes sir.

Q Now why were such instructions given?

A I was informed that the vessel had been sold, and that the new party did not have an insurable interest in the vessel at the time of the loss. Also, the loss occurred at a place that I did not consider covered under the terms of the policy.

Q What authority had you to give him such instructions on behalf of the Canton Insurance Company?

A It was my duty as agent of the company to do so.

Q Your agency included such authority generally?

A Yes sir.

Q Were these instructions at any time revoked by you?

A No.

Q In any way?

A No.

Q Or modified by you?

A No.

Q Did the Canton Insurance Office at any time thereafter, take any action admitting any liability under the policy?

MR. KERR. I object as calling for a conclusion of the witness, and further that the witness has not been shown to have any knowledge of the matter.

A No.

CROSS EXAMINATION:

Q (Mr. Kerr). Mr. Mason, were you employed by the Canton Insurance Company, or any of the defendants, directly, or were you employed as an agent?

A My agency was from Parrott & Company. It was confirmed by the Home office, at least the Hong Kong office of the company published my name in the list of its agents.

Q Were you employed as agent of the Canton Company to write insurance or by Parrott & Company of San Francisco?

A I was appointed by Parrott & Company in that capacity as general agent of the Canton.

Q You had no appointment directly from the Canton except as it came from Parrott & Company?

A It came through Parrott & Company.

Q You had no power of attorney from the Canton?

A No.

Q You know that Parrott & Company, being general agents of the United States, acted for the Canton through certain powers conferred upon them by written power of attorney?

A I presume they did.

Q Did you ever see the authority conferred by the San Francisco Board of Marine Underwriters on Captin Gibbs, if that authority is in writing?

A Well, if there is such authority in writing I never saw it.

Q You were not present at any time in San Francisco when the power and authority of Captain Gibbs was discussed by the Board of Marine Underwriters?

A No.

Q You have been testifying as to what Captain Gibbs' authority was simply from your supposition as to what his power and authority was?

A No, not purely supposition, Mr. Kerr. I have been interested in a number of losses where the matter has been of the disposition and handling of them was the subject of discussion between Captain Gibbs and myself and the general agents from San Francisco, who were here at the time.

Q Captain Gibbs is the representative of the San Francisco Board of Marine Underwriters, and whenever there is a loss affecting the members of that board, he acts, does he not, without direction from you as local agent, as a member of that board or the authority conferred upon him, without any request made by you?

A Well, either his acts would have to be at the request of one of the agents of a member of the board or else from a member of the board.

Q Well, you mean before Captain Gibbs could represent the San Francisco Board of Marine Underwriters he would have to go around the city of Seattle to get authority from the various local agents of members of the board?

A No, I do not mean that, Mr. Kerr. I mean this, that in case of a vessel being in any trouble, it would be Captain Gibbs' duty, and his custom and his practice, to immediately report that either to the agent here or to the Board in San Francisco, and follow the instructions that he received in reply to that report.

Q Follow the instructions received from whom? The Board of Marine Underwriters?

A The Secretary of the Board of Marine Underwriters, or follow the instructions of the agent of any member of that board.

Q Do you pretend to say that Captain Gibbs could not on behalf of the Board of Marine Underwriters undertake to make a survey or take whatever other steps that would be required in connection with a loss, that he is subject to the direction of the local agents of the various companies composing that board?

A Well, not in a matter of survey, now Captain Gibbs—

Q Any other matter connected with it?

A A salvage operation that would require the expenditure of money, Captain Gibbs would not undertake without specific authority either from the Board itself or from some agent or some member of the board.

Q You say that Captain Gibbs would go on and make a survey and make his report and then it would be up to the Board of Marine Underwriters to determine from that report, whether they would expend money for salvage purposes or not?

A Undoubtedly.

Q But up to that time he would act, as a rule, without instructions from anybody?

A Well, his action up to that time would simply be to investigate the situation and report.

Q And report the situation. And suppose he did report the situation, unless the Board of Marine Underwriters in San Francisco withdrew his authority, he would go ahead and make his report?

A No, he would await their instructions before he went ahead.

Q Do you mean to say that he would have to have instructions from a member of the Board of Underwriters that was interested before he could go ahead?

A No. He would have instructions from the Secretary of the Board who would call a meeting of the Board of

Underwriters in the City of San Francisco and discuss his report and agree upon the—

Q You mean to say the Board would do that?

A The Secretary of the Board would do that in San Francisco and would wire him instructions that would be decided upon by the Board at that meeting.

Q Now, as I understand you, you went to Captain Gibbs' office in the Colman building the morning after this vessel sank or was reported to have sunk in the newspapers, and there you instructed Captain Gibbs, so far as your company was concerned, to have nothing to do with the matter, for the reason you understood that the vessel had been sold and was not covered for that reason, and for the further reason you believed she was lost outside of the waters covered by the policy?

A Those were my reasons for giving those instructions.

Q That is the reason you went there and told him?

A Yes sir.

Q What did Captain Gibbs say to you?

A Captain Gibbs told me that he was going at Mr. Hamilton's request, and that he had told Hamilton that he was not representing the Underwriters. He told me that Hamilton had requested him, for them, to raise the vessel.

Q (Mr. Gorham). Who was Hamilton?

A Hamilton was one of the owners or owners agents. Hamilton and Schubach were managing owners of the vessel.

Q (Mr. Kerr). He told you that the morning after this accident occurred?

A Yes.

Q That he was not acting for the Underwriters but acting at Hamilton's request?

A Yes sir.

Q And yet you told him that you must not act for your company because the vessel had been sold, as you understood it, and had been lost outside of the territory covered by the policy?

A I told him he must not act for the Canton. I do not know whether I told him—

Q Why did you tell him that when he told you that he was not acting for the Marine Underwriters at all, but acting at Hamilton's request?

A Well, whether I told him after he told me that he was acting at Hamilton's request or whether I told him that before, and his statement that he was acting at Hamilton's request was a reply, I am not sure, but in either event—

Q Did you on any other occasion or any other loss, for any other company you represent in this section of the country give such instructions as that to the surveyor for the Marine Board of Underwriters in San Francisco?

A I do not know.

Q You do not remember?

A I do not remember. I may have.

Q Who told you this vessel had been sold?

A Mr. Hamilton, I think, told me at one time that they had sold the vessel to the Katalla Company, and the request came to me from the office of the broker who placed the risk with me, to accept the Katalla Company as one of the insured under the policy.

Q He requested you to transfer the risk?

A He requested me to transfer the risk or make the policy cover the interests of either party.

Q Did you do it?

A No.

Q Why did you decline to do it?

A Because the sale of the vessel to the Katalla Company would mean that the vessel would go to Katalla for employment, and I did not care to continue the risk.

Q Did the Katalla Company inform you that they were going to take the vessel to Alaska, and ask you to extend the risk to Alaskan waters?

A No, they did not ask me to extend the risk to Alaskan waters. But the broker representing the parties requested me to make that endorsement on the policy.

Q That is consent to the transfer.

A To consent to the transfer and I declined to do it.

Q You understood that if you did consent to the transfer that the vessel in order to be protected had to operate within the scope of the poilcy?

A Certainly.

Q What difference did it make to you whether you consented to the transfer or not?

MR. GORHAM: I object as immaterial, because they had a right if they desired, to decline to include the Katalla Company under the risk, and the mere fact that they decided to decline to do so was sufficient, without giving any reasons at all, and therefore it is immaterial.

A I declined to make the endorsement on the policy as requested for that reason as well as the further reason—

Q For the reason given by your counsel Mr. Gorham?

A No, we had no counsel at that time.

Q Usually if a vessel is sold and the vendor and the vendee wanted one of these marine policies assigned or consent to the sale made, you did not hesitate to do it?

A Not as a rule, no. But there were several features of this case that were not acceptable to us. Of course, some three or four years ago, my recollection is that the reasons operating in my minid at the time were that the future employment of the vessel would be in the north and also that there was a controversy between the parties over the sale of the vessel.

Q You understood that there was a controversy about the sale of the vessel, was that it?

A I am citing that as a probable reason that operated on my mind at the time. It is some three or four years ago, I know, but I know at the time—

Q Do you remember any other instance during the years you have represented the Board of Marine Underwriters, when you went to Captain Gibbs as their representative, and undertook to forbid him to act for the company that you represented?

A I have frequently given Captain Gibbs instructions,

whether instructions along these lines or not I do not remember—whether along these lines or not I do not recollect any case.

Q Did you know this vessel was lying up in the river where she was lost?

A No, I do not think I did until the time of the loss.

Q You considered then when you went to Captain Gibbs that there was no liability on your policy because the vessel had been sold, in the first place?

A That was all—

Q Well, if that was true, you knew anything Captain Gibbs might do would not bind you, didn't you?

A Well, I knew that.

Q The vessel had been sold and the policy had been rendered void by the sale?

A Without solving all these questions I though best thing to do was to have it definitely understood.

Q Mr. Mason, you knew if that vessel had been sold without the consent of your company that the policy was an absolute nullity, didn't you?

A I certainly did.

Q Then why did you go to Captain Gibbs on that occasion and say to him "Don't you do anything"?

A I considered that the circumstances sufficiently justified me in giving Captain Gibbs instructions.

Q And the second reason you assign is when you found she was sunk in the Duwamish river, you felt that she was outside of the scope of the policy when she was lost or damaged?

A Yes sir.

Q Did you give that to Captain Gibbs as a reason?

A I do not know that I gave Captain Gibbs either of my reasons.

Q Did you inform the Board of Marine Underwriters of these reasons that you had given Captain Gibbs?

A I think I informed the Canton Insurance Office. I did not communicate with the board.

Q Well, did you see any of the reports that Captain Gibbs made at the time as surveyor, to the Board of Marine Underwriters in San Francisco?

A No.

Q Did you know that he was purporting to act there as the representative of the Marine Underwriters all the way through?

A No, he was not purporting to act as the representative of the Board all the way through.

Q Do you know that his reports showed that he was acting as a member of the Board of Marine Underwriters all the way through?

A You mean with reference to this particular thing?

Q Yes, with reference to the Vashon?

A I do not think so. I do not think Captain Gibbs ever made any such reports to the Board—

Q Did you make any report to Parrott & Company, the general agents in the United States, of what you had said to Captain Gibbs?

A I presume I did.

Q Have you any recollection whether you did?

A I have no doubt I did, because I undoubtedly made a full report of the loss of the Vashon.

Q Parrott & Company were in consultation with other members of the Board of Marine Underwriters about the payment of this very loss, and part of these insurance companies were members of the Board and did pay the loss, you know that, don't you?

A I know that all of the companies having insurance under a different form of policy settled their loss.

Q You know that the whole matter of adjustment of this loss was taken up in San Francisco, Parrott & Company representing your company were present, and they all paid the loss except the companies that are involved in this suit?

A I do not know that, and I do not think that is quite the statement of fact, Mr. Kerr. There was different forms of contract on that vessel that was subscribed by the different companies, under different conditioins, and I understand those companies paid.

Q Did you see the other policies?

A I did, I think I did see the other policies.

Q Was any of your authority from Parrott & Company with reference to these matters of loss in writing?

A Only in the way of general correspondence.

Q All the authority you ever got or could have gotton from either the Canton or Parrott & Company, general agents, would be in writing?

A In the nature of general correspondence.

Q I say in the nature of correspondence?

A Yes, and by verbal instructions from their manager who was frequently here.

Q Well, if you undertook to tell the surveyor of the Board of Marine Underwriters of San Francisco the morning after this accident, that he must not assume to represent your company as a member of that board, you would certainly report the matter of as great moment as that to Parrott & Company?

A I presume that I reported it.

Q Will you examine that correspondence with Parrott & Company and the Canton, both, at that time, and ascertain whether you made any report in that connection to either of them, and if so will you bring your correspondence in here at the next sitting, so that I can see it?

A I will write to the office of Parrott & Company to return the letters. My own copies, of course, and correspondence have all been destroyed. I closed my office about three years ago, and since then have destroyed all the office records and files. But the original letter to Parrott & Company is probably in the files in San Francisco.

Q Did you ever have a conversation with Captain Gibbs after that morning about this vessel?

A Oh, the matter was the subject of conversation with Captain Gibbs several times.

Q Did you have any, to your knowledge, about this vessel?

A Yes sir.

Q Did he tell you what was being done?

A Yes sir.

Q He told you what was being done?

A Yes sir.

Q Did you inquire of him or did he make a statement as the representative of the Board?

A I went to Captain Gibbs frequently in the course of my business and on other occasions.

Q Why did you go to him, what was being done with reference to the loss of the Vashon, after you claim to have given him instructions the morning after the accident to take no action in behalf of your company?

A I did not go to him for that purpose, Mr. Kerr, the matter was brought up at different times when I was in conversation with Captain Gibbs possibly on other subjects and the salvage of the Vashon was talked about the same as any other matter, and I may have spoken to him with reference to it, because this matter was the subject of considerable correspondence and negotiations with the office of Johnson & Higgins for a period of six or eight months after the loss. I think that I did have occasion several times to call on Captain Gibbs regarding it.

Q If, as a matter of fact, this vessel had not been sold and if, as a matter of law, she was inside the scope of the policy when she was lost, there was no reason why your company should not pay the loss, that you know of?

A If the policy conditions were intact and the risk was in effect.

Q If the risk was in effect and she had not been sold, and admitting that she was within the terms of the policy, within the scope of the policy when she sank, these are the only two objections that you ever made to it?

A These are the only two that I think I had in mind at the time.

REDIRECT EXAMINATION.

Q (Mr. Gorham). I show you respondent's identifications "1" and "2." "1" is a letter from Johnson & Higgins' attorney, to Frank Waterhouse & Company, in re Vashon, and dated August 10th, 1907. And "2" is from Johnson & Higgins to Frank Waterhouse Company dated August 16th, 1907. What had Frank Waterhouse Company to do with the matter at that time?

A They were the brokers who placed the risk originally.

Q Johnson & Higgins.

A Frank Waterhouse & Company originally placed this risk. They offered it to me for insurance and to the other office.

Q Who did finally place the risk, Johnson & Higgins or Waterhouse, with your company?

A Waterhouse.

Q In what capacity does Johnson & Higgins act in this matter?

MR. KERR: I object, the letters speak for themselves.

A Johnson & Higgins I believe secured the account subsequent to the placing of the insurance and became the representatives of the Indpendent Transportation Company.

Q And why were these letters addressed to Frank Waterhouse Company?

A Because the insurance had been placed through Frank Waterhouse Company as brokers.

Q Were Frank Waterhouse Company the agents at this time, August 1907, of the Canton?

A No.

Q Is that the request you testified to in your cross examination, for transfer of the assured under the policy to the Independent Transportation Company or the Katalla company?

A Yes. Frank Waterhouse Company forwarded that request to me and asked me to give the endorsement as requested. I returned it, declining to do so.

Q And subsequently Johnson & Higgins withdrew the request, as per identification "2"?

A Yes, I understood they did.

(Testimony of witness closed).

E. H. HUTCHINSON, a witness called on behalf of the respondents, being duly sworn, testified as follows:

Q (Mr. Gorham). What is your business?

A Marine Insurance.

Q How long have you followed that business?

A Twenty one years.

Q In what capacities?

A I was in a broker's office in London, and was then connected with Lloyd's for ten years. I then went to China with the Yang Tsze Insurance Association and am still in their employ.

Q What capacity do you represent the Yang Tsze Association in Seattle?

A Manager of their office here, agent.

Q How long have you occupied that position, approximately?

A About two and three fourth years.

Q What are your powers and duties as agent and manager of the Seattle office?

A Accepting insurance and settling claims.

Q General agency?

A General agency, yes.

Q (Mr. Kerr). You have a power of attorney?

A Power of attorney from the company.

MR. KERR: I object on the ground that the power of attorney is the best evidence.

Q (Mr. Gorham). I show you libellant's exhibit "H" being the Yang Tsze Insurance Association policy on the Vashon involved in this suit, and call your attention to the endorsement on the policy in typewriting "Warranted em-

ployed in the general freighting and passenger business on Puget Sound within a radius of 30 miles from Seattle. Warranted not to carry lime under deck. W. W. T."

MR. GORHAM: Will you admit, Mr. Kerr, that the initials "W. W. T." are the initials of W. W. Tomlinson who countersigned the policy?

MR. KERR: If you say it is.

MR. GORHAM: It is.

Q Are you familiar with the construction placed upon such an endorsement in these particular words, among the insured and underwriters on Puget Sound?

A Yes sir.

Q What is the accepted meaning of that term, that specific term among the insured and underwriters on Puget Sound and during the year 1907?

MR. KERR: I object as incompetent.

A That he would warrant that the vessel will be employed during the continance of the policy in general freighting and passenger business on Puget Sound within a radius of 30 miles of Seattle and will not carry lime under deck.

Q Does the endorsement operate as a condition precedent or as a condition to run during the term of the policy?

MR. KERR: I object as immaterial.

A From the inception of the policy to its termination.

Q I will ask you if you were the agent of this company at the time this policy was written, July 16, 1907?

A No, I was in the head office in Shanghai.

(No cross examination).

(Testimony of witness closed).

F. A. FREDERICKS, a witness called on behalf of the respondents, being duly sworn, testified as follows:

Q (Mr. Gorham). Your residence?

A Seattle.

Q Your business?

A Marine Insurance.

Q How long have you followed that business, Mr. Fredericks?

A Oh nine or ten years.

Q What capacities?

A As agent.

Q With what powers and duties?

A As local agent under San Francisco and as agent direct from the head office with full power.

Q Writing policies and settling risks?

A Yes sir.

Q What companies do you represent, among others I will ask you if you represent the China Traders Insurance Company?

A Yes sir.

Q Of Hongkong?

A Yes sir.

Q I show you libellant's exhibit "F", the China Traders' policy, and call your attention to the endorsement in the following language, in typewriting, "Warranted employed in the general freighting and passenger business on Puget Sound within a radius of 30 miles of Seattle. Warranted not to carry lime under deck." With initials in handwriting "W. W. T."

MR. GORHAM: I will ask you Mr. Kerr if you will admit these are Mr. Tomlinson's initials? They are?

MR. KERR: Yes sir.

Q I will ask you if you know what the accepted construction at Seattle, in the year 1907, among the insured and underwriters had been of such endorsement of that language as regards the effect of the endorsment as to time?

MR. KERR: I object as incompetent.

A The effect of the endorsement would be that during

the life of the policy the vessel would be confined within the limits specified.

Q And the trade?

A And the trade specifically.

Q Then I understand you, that the endorsement is not a condition precedent but a condition to operate at the time of the attaching of the policy and during the life of the policy?

MR. KERR: I object as incompetent.

A Yes sir.

Q What has been, approximately, the volume of your business at Seattle?

A In dollars and cents?

Q Yes, in dollars, approximately, to show what your experience has been.

A Premium income?

Q Yes sir.

A Well, it varies. Some years forty or fifty thousand dollars.

Q What would be the amount of risk carried under such volume of business?

A Several million dollars.

Q It has been under your direct supervision and agency?

A Yes.

Q Were you the agent of the China Traders' at the time this policy was written on the Vashon?

A No sir.

Q You know Mr. Tomlinson?

A Yes sir.

Q Is that Mr. Tomlinson's signature?

A Yes sir.

Q These are his initials under this endorsement I have read on exhibit "F"?

A Yes sir.

(No cross examination).

(Testimony of witness closed).

Hearing adjourned until August 17, 1911 at 1:30 p. m.

Seattle, Washington, October 1, 1912.

PRESENT: Mr. Kerr, for the libellant.
Mr. Gorham, for the respondent.

J. R. MASON, recalled on behalf of the respondents, testified as follows:

Q (Mr. Gorham). I hand you a paper which has been marked for identification No. 25, and ask you when you first saw that?

A Well, this is a copy of a letter sent from my office to Parrott & Company, of San Francisco, general agents of the Canton Insurance Office, in response to a request in a letter from them asking that I make a report on the steamer Vashon and forward it to them.

Q You have read that letter?

A Yes sir, I have read this through and I recognize it as a copy of my letter, to the best of my knowledge and belief.

MR. GORHAM: That is the letter you called for, Mr. Kerr. Have you any objection to it because it is not the original?

MR. KERR: No.

MR. GORHAM: I offer the letter in evidence.

Paper marked respondents exhibit 25, filed and returned herewith.

Q I ask you, Mr. Mason, if the Canton Insurance Office was a member of the San Francisco Board of Marine Underwriters at the time of the accident to the Vashon, the time she was wrecked in the Duwamish river?

A They were said to be members of the Board. I used the Board's services, and the Board's surveyors. It was my understanding they were members of the Board.

Q That they were members of the Board of San Francisco Underwriters?

A The Canton Insurance Office, you mean?

Q Yes sir.

A Yes sir, they were members of the Board.

(Testimony of witness closed).

MR. GORHAM: We want to offer these two letters that were marked identifications 1 and 2, in evidence. They were identified and referred to during the examination of several of the witnesses, but not formally offered.

Letters marked respondents exhibits 1 and 2 respectively, filed and returned herewith.

MR. GORHAM: We offer in evidence a certified copy of the field notes of sections 17, 18, 19, 29 and 30, township 24 north, range 4 east, Willamette Meridian, certified by the United States Surveyor General for Washington, under date of August 19, 1911, for the purpose of showing the meanders of the Duwamish river at and about the place where the wreck occurred.

Paper marked respondents exhibit 26, filed and returned herewith.

MR. GORHAM: And for the same purpose we offer a certified copy of the plat of the same township, under certificate of the United States Surveyor General for Washington, of date August 19, 1911.

Paper received without objection, marked respondents exhibit 27, filed and returned herewith.

MR. GORHAM: I also offer in evidence and ask to have filed a stipulation entered into on the 20th of April, 1912.

Paper marked respondents exhibit 28, filed and returned herewith.

MR. GORHAM: I also offer this further stipulation as to certain evidence, dated October 1, 1912.

Paper marked respondents exhibit 29, filed and returned herewith.

F. A. FREDERICKS, recalled on behalf of the respondents, testified as follows:

Q (Mr. Gorham). Was the China Traders Insurance Company a member of the Board of San Francisco Marine Underwriters, at the time of the disaster to the Vashon involved in this case?

A No sir.

(Testimony of witness closed).

MR. GORHAM: Respondents rest.

Testimony closed.

United States of America, Western District of Washington, Northern Division. ss.

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, residing at Seattle, in said District, do hereby certify, that the foregoing transcript from page 1 to page 192, both inclusive, contains all of the oral testimony offered before me by the parties.

The several witnesses, before examination, were each duly sworn to testify the truth, the whole truth and nothing but the truth.

The testimony was reduced to writing by myself, or under my direction, at the times stated in said transcript.

Proctors for the parties stipulated waiving the signatures of the witness to the testimony given by them before me.

The exhibits offered by the parties, as shown in the transcript and index, have been marked, filed, and are returned herewith.

The exhibits 9 and 22, offered by the respondent, have been copied in the record, and the originals returned, by agreement of the parties.

I further certify that I am not of counsel nor in any way interested in the result of this suit.

Witness my hand and official seal this 1st day of October, 1912.

(SEAL) A. C. BOWMAN,
U. S. Commissioner.

COMMISSIONER'S TAXABLE COSTS:

Libellant:

Hearings, Nov. 10, 14; Dec. 6, 1910; Mch. 15, 1911, 4 days at $3	$ 12.00
Administrating oaths to 6 witnesses	.60
Filing 40 exhibits at 10 cents	4.00
Transcript above hearings, 354 folios at 10 cents	35.40
	$ 52.00

Respondents:

Hearings August 17, 18, 1911; Oct. 1, 1912	$ 9.00
Administering oaths to 5 witnesses	.50
Filing 29 ezhibits at 10 cents	2.90
Transcript above hearings, 240 folios at 10 cents	24.00
	$ 36.40

(Endorsed): Filed in the U. S. Dist. Court, Western Dist. of Washington, Northern Division, Nov. 8, 1912. Frank L. Crosby, Clerk, by L. Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 3849.

INDEPENDENT TRANSPORTATION COMPANY, Libellant,

vs.

CANTON INSURANCE OFFICE, LIMITED, ET AL, Respondents.

Be it remembered that on Tuesday, May 17th, 1910, pursuant to stipulation of counsel hereinafter set forth, at the office of Messrs. Page, McCutcheon & Knight, in the Merchants Exchange Building, in the City and County of San Francisco, State of Califonia, personally appeared before me, Clement Bennett, a notary public in and for the City and County of San Francisco, State of California, Louis Rosenthal, Harry Pinkham, Harry Stephenson Smith, Mitchell Thompson, John Barneson, Edgar Alexander and James John Theobald, witnesses produced on behalf of the respondents, and James John Theobold, produced on behalf of the libellant.

Ira Campbell, Esq., appeared as proctor for the libellant, and William H. Gorham Esq., appeared as proctor for the respondents, and the said witnesses, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is stipulated that the testimony of Louis Rosenthal, Harry Pinkham, Harry Stephenson Smith, Mitchell Thompson, John Barneson, Edgar Alexander and James John Theobald may be taken under Section 863 of the Revised Statutes of the United States, without the usual notice, and that the signature of the witnesses may be waived, and that it may be transcribed into typewriting and filed by the notary, and used with the same force and effect as though the witnesses themselves had testified orally in court.

It is further stipulated and agreed between the proctors for the libellant and respondent that the testimony to be taken hereunder may be used in the case of the Independent Transportation Company vs. Canton Insurance Office, Limited, the case of the Independent Transportation Company

vs. The China Traders Insurance Company, Limited, and the case of the Independent Transportation Company vs. Yang Tsze Insurance Association, Limited, all consolidated under No. 3849, in the United States District Court for the Western District of Washington, Northern Division).

DEPOSITION OF LOUIS ROSENTHAL.

State of California, City and County of San Francisco, ss.

LOUIS ROSENTHAL, a witness produced on behalf of the respondent in the above entitled cause, having been duly sworn, testified as follows:

Q MR. GORHAM: What is your full name?

A Louis Rosenthal.

Q Your age?

A 45.

Q Your residence?

A San Francisco.

Q How long have you resided in San Francisco?

A 36 years.

Q Your occupation?

A Marine insurance.

Q How long have you followed the business of marine insurance?

A 27 years.

Q In what various departments?

A In no other department except marine insurance.

Q In what department in marine insurance?

A From clerk to general agent.

Q Are you representative of any foreigin marine insurance company?

A The Switzerland General of Zurich, Switzerland, and the Thames & Mersey Marine Insurance Company of Liverpool.

Q Have you any relation with the Marine Board of Underwriters of San Francisco?

A I am president of the San Francisco Board of Marine Underwriters.

Q Is the office of president of the Board an honorary office or is it an active office?

A It is an honorary office, honorary in so far that it is without emolument; still, it is active, of course, to a certain extent.

Q To what extent?

A To the extent of attending as president to the affairs of the Board.

Q Administrative head of the Board?

A Administrative head of the Board.

Q Is that the only Marine Board in San Francisco?

A That is the only Marine Board in San Francisco.

Q Are you familiar with the San Francisco form of policy for marine insurance?

A Yes sir.

MR. GORHAM: I will ask to have this paper marked for identification, Exhibit 1.

(The notary marks the paper "respondent's exhibit 1")

Q I call your attention, Mr. Rosenthal, to this indorsement, "Vessel warranted employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle." I will ask you what in your opinion is the construction of that clause relative to the time during which it is operative, that is to say, whether as a warranty in the nature of a condition precedent which must prevail and exist at the time of the attaching of the policy, or whether it is a warranty continuing during the life of the policy; in other words, what is the understanding of the Marine Underwriters in the use of such language as is contained in that warranty?

MR. CAMPBELL: Objected to as calling for the opinion and conclusion of the witness, and tending to vary the terms of a written contract.

A My opinion is that this vessel from the inception of the policy and during the entire life of the policy must be employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle.

CROSS EXAMINATION.

Q MR. CAMPBELL: By that you mean that when employed the vessel must be employed in that way?

A I should say so, Mr. Campbell. Of course, it is quite usual for vessels to be unemployed for an hour or a day, as you may say, but every vessel is unemployed at certain times.

Q It is customary with the underwriters on this coast under the San Francisco form of hull time policy such as this policy is to permit vessels to lay up and still remain covered under the policy?

MR. GORHAM: I object to that question on the ground that it is not proper cross examination and is immaterial, because there is no permission provided for in the contract or pleaded in the libel.

A Under the San Francisco policy it is customary to notify the insurance company when vessels go out of commission, and an endorsement is usually put on the policy stating that the vessel is laid up and out of commission, and when she resumes her employment again the insurance companies are again notified and a clause to that effect is put on the policy.

Q MR. CAMPBELL: That does not answer my question. During the period she is laid up, under the policy she is still held covered by the policy, is she not?

A Undoubtedly, if the company has had notice that she is laid up, and has accepted such notice.

Q It is the universal custom among the underwriters to hold the vessel covered during the period of laying up; no return of premium is paid unless specially agreed on?

A I do not say it is the usual custom. A thing of this kind is conceivable, that a man should say "I am going to lay my vessel up at a certain place," and they will say "We do not want your vessel laid up at that place, and will not cover it while it is laid up in that place."

Q Are vessels usually or not usually held covered when laid up?

A They are usually held covered, especially when they are laid up in customary and usual places.

Q You would read this warranty as touching the character of her employment, as I understand. That warranty designates the character of trade and business in which she is to be employed?

A The character of her employment and the locality.

DEPOSITION OF HARRY PINKHAM.

State of Californit, City and County of San Francisco, ss.

HARRY PINKHAM, a witness called on behalf of the respondent in the above entitled cause, having been duly sworn, testified as follows:

Q MR. GORHAM. State your full name?

A Harry Pinkham.

Q Your age?

A 38.

Q Your residence?

A Burlingame.

Q California?

A Yes sir.

Q How long have you lived in California?

A About 37 years.

Q What is your occupation?

A I am the manager of the marine department for J. B. F. Davis & Son.

Q What is that firm What business are they in?

A They are in the general brokerage business, insurance, and they are the managers of the Standard Marine Insurance Company of Liverpool, England.

Q How long have you been following the marine insurance business?

A I have been connected with Davis for 23 years, and a greater portion of that time I have been in the marine department.

Q What are your duties in charge of the marine department of the firm by which you are employed?

A I am the local underwriter for the Standard Marine Insurance Company. I place all the marine business as broker for Davis.

Q Without asking an impertinent question, or seeking a disclosure of your business, I will just ask generally the volume of the business that you handle a year?

A As brokers?

Q Yes.

A Well, I could not give you only an approximate idea; say $150,000 a year in premiums. I guess it runs more than that, $200,000 in premiums.

Q I just want to have the court get a general ida of the volume of the business that you transact. Are you familiar with the San Francisco form of hull time marine policy?

A Yes sir.

Q I show you respondent's exhibit for identification No. 1, and call your attention to a warranty clause in the following words: "Vessel warranted employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle," and ask you if you know what construction the insurance trade in San Francisco place upon the clause relative to the time when it is operative, whether it is a warranty understood as a condition precedent and affecting the vessel only at the time the policy attaches, or whether it is a warranty operative during the life of the policy?

MR. CAMPBELL: That can be answered by yes or no.

Q MR. GORHAM: That calls for an answer yes or no.

A How did you ask it. Make that statement again.

Q Read the question, Mr. Notary.

(The Notary reads the question.)

A You mean to say I have got to answer that question yes or no?

Q Do you know what construction the trade put on it, that is, whether you do or do not?

A I am of the opinion that I do know, yes.

Q What is the understanding of the insurance trade with respect to the clause to which your attention has been called, relative to the time when it is operative?

MR. CAMPBELL: I object to the question asked as calling for the opinion and conclusion of the witness, and tending to vary the terms of a written contract.

A Well, I will say that the understanding is that the vessel shall be confined to the trade as stated by the clause.

Q MR. GORHAM: Confined during what time?

MR. CAMPBELL: The same objection.

A The full life of the policy.

Q MR. GORHAM: What is your understanding of that clause relative to the time during which that clause is effective?

MR. CAMPBELL: The same objection.

A My understanding is that the vessel is warrented to be employed on Puget Sound during the life of this policy exclusively.

CROSS EXAMINATION.

Q Mr. Campbell: Have you ever written that same clause on another policy?

A Yes sir; I believe I have, many times.

Q That same clause?

A Of course, I could not say absolutely the same clause, but I possibly may have written the same clause many times, or a similar clause.

Q I am not asking about a similar clause, but whether you have made that particular clause on any other policy?

A I could not say yes, without looking up my records.

Q Under the San Francisco form of hull time policy

such as that is, does the insurance trade, so to speak, of San Francisco recognize the right of the insured vessel to lay up during the life of the policy, and be held covered under the policy?

A The San Francisco policy will cover a vessel at all times, whether laid up or in commission.

Q I understand that your construction of that warranty is one which affects the trade in which the vessel is to be employed. Is that it?

A Yes sir.

Q It is a warranty that touches the employment of the vessel?

A That is the idea; to restrict the trade of the vessel in certain waters.

RE-DIRECT EXAMINATION.

Q MR. GORHAM: Look at that exhibit and see if you can testify whether or not that is the San Francisco form of a hull time policy (handing)?

A Yes sir, it is.

Q And the clause to which your attention has been directed is what is called an endorsement?

A An endorsement in addition to the policy.

Q A marginal endorsement?

A Yes sir.

DEPOSITION OF HARRY STEPHENSON SMITH.

State of California, City and County of San Francisco, ss.

HARRY STEPHENSON SMITH, a witness called for the respondent in the above entitled cause, having been duly sworn, testified as follows:

Q MR. GORHAM: State your full name?

A Harry Stephenson Smith.

Q Your age?

A 60 years of age.

Q Your residence?

A I sleep in Oakland.

Q Your place of business?

A San Francisco.

Q What is your business?

A General marine agent.

Q How long have you followed that business?

A 28 years.

Q Where have you followed that business?

A In San Francisco.

Q State whether or not you have followed that business in all its departments?

A In all its departments.

Q Is your firm the representative of any marine insurance company at present?

A Yes sir.

Q Will you name it?

A The Maritime Insurance of Liverpool and the Western Assurance of Toronto.

Q Are you familiar with the San Francisco form of hull time marine policy?

A Yes sir.

Q I will show you respondent's exhibit for identification No. 1, and call your attention to the marginal endorsement and warranty clause reading "Vessel warranted employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle," and ask you if you know what the understanding in the insurance business or trade is at San Francisca with respect to that clause, particularly with respect to the time the warranty is effective?

A I do.

Q Will you state what it is?

MR. CAMPBELL: We object to the question as calling for the conclusion and opinion of the witness, and tending to vary the terms of a written contract.

A This indicates that the vessel is to be employed in a general passenger and freighting business on Puget Sound during the entire period of the policy contract.

Q MR. GORHAM: Then I understand you that it is not in the nature of a condition precedent effective only at the instant that the policy attaches, but it is effective during the entire life of the policy?

MR. CAMPBELL: The same objection.

A Yes sir, it is effective during the entire life of the policy.

Q MR. GORHAM: That is the general interpretation and construction of San Francisco among the marine insurance underwriters?

MR. CAMPBELL: The same objection.

A Yes sir.

CROSS EXAMINATION.

Q MR. CAMPBELL: Mr. Smith, did you ever attach or see attached to any other policy of insurance other than the policy subject to this litigation on which that warranty was written?

A Yes sir.

Q That particular warranty?

A Yes sir.

Q What policies?

A I suppose I have seen a hundred. I could not tell you the individual policy.

Q Have any of those policies ever been construed by the courts?

A I don't know.

Q Have you those policies in your possession?

A I think it is doubtful. The policy always goes to the assured, you know.

Q Where are those policies?

A I suppose in the hands of numerous assured; I could not say.

Q Do your books show what policies are written with that particular warranty endorsed on that?

A I think possibly we may have copies of policies with that endorsement on.

MR. CAMPBELL: I ask that the witness produce them.

Q Did you have any losses under those policies that you recall at the present time?

A I have not any doubt in the world but what we have.

Q Do you recall having any losses on those policies?

A Not at the moment, I do not.

Q Do you recall having been called upon to construe that policy by reason of loss of the character of loss in this case?

A I don't know exactly what the character of the loss in this case is. I don't think we have been called upon to construe that clause in any way. I don't think we have. I don't remember.

Q Will you look up your records and see if you can produce what I have asked for?

A Certainly I will. You must remember that all records prior to three years ago have been destroyed.

Q Can you name me now any policy issued to any assured with that particular warranty on? Not a similar warranty, but that particular warranty on the policy?

A I could not for the moment, no, but I know it is quite usual.

Q Do you mean the exact wording in that warranty and every wording of the warranty of the usual?

A Yes sir. I have seen it in a great many cases, I feel sure.

Q Do you recall any particular case now?

A I cannot just for the moment.

Q Where were these vessels insured that had this warranty that you speak of?

A In San Francisco.

Q Where were the vessels being employed?

A Puget Sound, British Columbia, and San Francisco Bay.

Q In answering these questions, are you bearing in mind the exact wording of this warranty?

A I think so. I think I recognize the wording on it. It did not seem to me unusual in any way.

Q I am saying the exact wording.

A I think that is about as they are constantly written.

Q You are not positively sure that the warranties that you are referring to are exact in terms with this policy?

A I think they are.

Q I say, you are not exactly sure about it?

A I would not be exactly positive that they are verbatim, but I think they are.

Q The warranty as you construe it is a warranty which touches the character of employment?

A Yes sir.

Q It is a warranty which goes to the employment of the vessels?

A Yes sir.

Q Under the San Francisco form of a hull time policy such as this is in this case, are the vessels covered while they are laid up, within the terms of the policy?

A No sir.

Q They are not?

A No sir.

Q Are they not customarily regarded by the trade as covered while they are laid up?

A I don't think they are, without notice. It is customary to give notice to the insurance company, if they desire to have them laid up under that policy.

Q It is customary to hold them while they are laid up, if notice is given?

A It is customary on notification.

Q That is, if the underwriter has knowledge of the fact that the steamer is laid up?

A If they get due notification, it is quite customary to grant it.

Q The only difference between the San Francisco form of the hull time policy and the English form is that the San Francisco form does not provide for the return of premium?

A It does not provide for return of premium.

Q That is the difference between the two policies covered so far as laid up?

A That is one of the differences, that is my reply.

Q What other differences are there?

A The text of the policy differs very materially.

Q So far as the laying up period is concerned?

A As I recollect the English policy has a specific agreement to lay up and return premium which the San Francisco policy does not.

Q Under the San Francisco form of policy, it is customary for the underwriters to recognize the right of the owner to lay up his steamer and be held covered, but no premiums to be returned unless the underwriter sees fit to make the return?

A An underwriter would always prefer to have the vessel laid up than going.

Q Is not that the custom of the insurance trade? That is what I am getting at.

A It is quite customary for the assured to obtain from the underwriter a concession in premium when their vessels are laid up and out of commission.

Q During which period the vessel is always covered?

A During which period the vessel is always covered.

Q It is customary for the San Francisco underwriters to recognize that the vessel is held covered during that period?

A If it is so endorsed on the policy.

Q Don't they do it where the endorsement is not made on the policy?

A No sir.

Q They do not?

A No sir.

Q Don't they do it on due notification?

A If the notification is sent them with the policy an endorsement is made thereon reducing the premium and covering the risk while laid up.

Q Supposing there is no reduction of premium.

A I would not consider it necessary for him to notify the company in that case.

Q They would be held covered while they are laid up any way?

A I think they would be held covered while laid up, whether they notified the company or not, if they did not require a return premium.

RE-DIRECT EXAMINATION.

Q MR. GORHAM: In reference to other policies and warranty clauses similar to this, I will ask you, where a warranty in the nature of a marginal endorsement is placed on a policy providing the vessel is warranted employed in a certain trade within certain defined waters, the verb "employed" being used in the form the past participle "employed" without any form of the auxiliary very "to be" so that your endorsement would read "vessel warranted employed in" then following the trade and prescribed waters, the underwriters at San Francisco, I understand you to construe the word "employed" as there used to refer to a time future relative to the date of the policy, so that it will cover and be effective during the term of the policy; is that correct?

MR. CAMPBELL: I object to the question as being leading and calling for the opinion and conclusion of the witness and tends to vary the terms of the written contract.

A That is my opinion.

Q MR. CAMPBELL: By the construction that you

are giving to this warranty, Mr. Smith, you do not mean to say that a vessel covered by this policy, with that warranty upon the policy, must be constantly, continuously, and for every moment during the life of the policy, employed in that business on those waters?

A Are you putting emphasis on the word "employed."

Q My emphasis is one the word "continuously and constantly employed" during every moment of the life of the policy?

A I should answer that by saying that if she is employed, she must be employed in those waters.

DEPOSITION OF MITCHELL THOMPSON.

State of California, City and County of San Francisco, ss.

MITCHELL THOMPSON, a witness produced on behalf of the respondent in the above entitled cause, having been duly sworn testified as follows:

Q MR. GORHAM: What is your name?

A Mitchell Thompson.

Q Your age?

A 36.

Q Your residence?

A Alameda.

Q Your place of business?

A 112 Market Street.

Q Where?

A San Francisco.

Q What is your business?

A Insurance broker.

Q What class of insurance or character of insurance?

A General insurance.

Q Marine, as well as others?

A Yes sir; you might say principally marine.

Q How long have you been in that business?

A I have been in the marine insurance brokerage business for about nine years.

Q To what extent in volume of business?

A Do you mean the volume of business placed here?

Q Yes, generally speaking?

A I think about $150,000.

Q Are you familiar with the San Francisco form of hull time policy, marine insurance?

A Yes sir.

Q I show you respondent's exhibit 1 for identification and call your attention to the marginal endorsement in the following words: "Vessel warranted employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle," and ask you if you know what the insurance trade or marine underwriters at San Francisco understand as to the meaning of that clause?

A Yes sir, I think I do.

Q What is their understanding of the meaning of that clause?

MR. CAMPBELL: I object to the question as calling for the opinion and conclusion of the witness and tending to vary the terms of a written contract.

A I believe that the construction of that would be that the warranty would be running with the time of the policy while the vessel was employed.

MR. GORHAM: Q As I understand you, the warranty is effective during the term of the policy, and not exclusively at the time of the attachment of the policy?

MR. CAMPBELL: The same objection.

A During the term of the policy.

MR. GORHAM: Q The use of the word "employed" in that warranty without any form of the auxiliay verb "to be" then does not confine it to the past tense "employed" at the time of the attachment of the policy?

MR. CAMPBELL: Objected to as leading and calling for the conclusion of the witness, and tending to vary the terms of a written contract.

A I should say not.

CROSS EXAMINATION.

MR. CAMPBELL: Q Mr. Thompson, are you agent for any companies?

A No sir.

Q Were you interested in placing any of the insurance upon the steamer "Vashon" that was lost?

A No sir.

Q Do you recall at the present time any policy which contained this particular warranty in those exact words?

A No sir, I do not.

Q Do you recall their particular warranty in those exact words having been discussed among underwriters in any other case than the case which is in suit?

A I should answer no, except similar warranties as referring to San Francisco Bay. My business is in San Francisco, and I have no business in Puget Sound.

Q I am speaking about this particular one.

A No sir.

Q The construction you place on this warranty is one touching the character of the employment of the vessel?

A Yes sir.

Q Your construction is, as I understand it, that while she is employed she is to be employed in that particular trade and in those particular waters?

A Yes sir.

Q Under the San Francisco form of hull time policy, such as this is, does the trade hold the vessel covered while she is laid up, if there is no return of premium?

A In my opinion, they do, yes; if the hazard is not increased, I should like to add, by so doing.

Q That is a matter of opinion, whether the hazard is increased or not?

A That is something, but if the hazard is not increased, I should say that the vessel was held covered while laid up, —providing the hazard was not increased.

Q If she was laid up in a place that is usual and customary to lay up vessels of that character, in your judgment would the custom of the insurance trade in San Francisco regard the vessel as covered while laid up?

A If she was laid up in a safe place, I should say yes.

RE-DIRECT EXAMINATION.

MR. GORHAM: Q The premiums are fixed in view of the risk to which the vessel is exposed, are they not?

A Yes sir.

Q If your vessel is to operate on Puget Sound and she is laid up in San Francisco Bay, she would not be within the terms of the policy, would she?

MR. CAMPBELL: Objected to as being immaterial and having no bearing on the issues in the case.

A I should say not.

MR. GORHAM: Though it would be equally a safe place?

A I should say that the vessel would have to be laid up within the conditions of the policy.

Q Within the prescribed waters?

A Yes sir.

RE-CROSS EXAMINATION.

MR. CAMPBELL: Q That is merely a matter of opinion on your part?

A That is all.

Q You are not testifyying to what is the custom of the insurance trade in that respect?

A I am simply expressing my opinion as a broker.

MR. CAMPBELL: I move to strike out the opinion of the witness as incompetent, irrelevant and immaterial.

MR. GORHAM: What do you base your opinion on?

A From my general knowledge of the business and general experience of the brokerage business.

MR. CAMPBELL: Q If this warranty instead of having the words "Puget Sound" had the words "San Francisco Bay" and the vessel was laid up in Oakland Creek, where it is customary to lay up vessels of this class, if it is so customary, you would regard the trade as recognizing that the vessel was covered during the laying up period?

MR. GORHAM: Objected to as immaterial and not proper cross examination.

A Yes sir, I would consider the vessel covered.

MR. CAMPBELL: Q You do not mean to say that the vessel has actually got to be laid up in the waters which are technically known as San Francisco Bay? They may be waters which are tributary to the Bay, if they are waters in which it is customary to lay up vessels of that class?

A If it is waters that are safe to lay vessels up in, I would consider her as being within the warranty.

Q Safety is largely judged by what it is customary to do with vessels of that class, is it not?

A It is a matter of opinion, of course.

Q Is that not the way you usually judge safe places, by what is customary?

A What might be safe for one vessel might not be safe for another.

Q If vessels of this particular class are customarily laid up in that particular place, is not that the means by which you usually judge the safety of the place?

A If it can be considered as being within the policy warranty, I should say that she would be covered.

Q That is not exactly what I am asking you. You say if she were laid up in a safe place?

A A safe place within the policy warranty.

Q Do you mean that that safe place would have to be

confined to what are technically known as the waters of San Francisco Bay, for instance?

A If the policy provided for San Francisco Bay absolutely, it would have to, yes; what we would ordinarily call San Francisco Bay. If you have reference to Oakland Creek, we construe that as San Francisco Bay also.

Q Suppose it is up in the Straits of Canquinez?

A I would consider that as a part of San Francisco Bay.

Q Are you familiar with Seattle?

A No sir.

Q On the government charts and the Coast Survey, Carquinez Straits are not within the technical description of San Francisco Bay, are they?

A It is customary whenever policies are warranted to San Francisco Bay, to also include tributaries by so stating.

Q You would consider that the same thing was true as to the tributaries of Puget Sound, would you not?

A The warranties usually provide for San Francisco Bay and tributaries.

Q If the warranty simply said "San Francisco Bay," would you then include the tributaries?

A I would say that the policy was faultily written.

Q If the vessel was laid up in a tributary under that form, would you consider she was held to be covered?

A If it could be construed as a safe tributary, I would consider that she was covered.

Q You would say the same thing regarding Puget Sound, would you not?

A I suppose so. I do not know anything about Puget Sound, so I could not say.

Q If the tributary was safe, you would consider it the same?

A I would construe it the same.

DEPOSITION OF HARRY STEPHENSON SMITH, (Recalled).

MR. CAMPBELL: Q Are any of your companies interested in the loss of the "Vashon"?

A No sir.

Q You did not reinsure either the Canton or the China Traders, or the Yang-Tsze.

A I did not.

DEPOSITION OF JOHN BARNESON.

State of California, City and County of San Francisco.—ss.

JOHN BARNESON, a witness produced on behalf of the respondent in the above entitled cause, having been duly sworn, testified as follows:

MR. GORHAM: Q State your full name?

A John Barneson.

Q Your age?

A 48.

Q Your residence?

A San Mateo.

Q Your place of business?

A San Francisco.

Q Your occupation?

A Shipping and commission, general merchant.

Q How long have you followed the shipping business?

A 20 years as a merchant.

Q Ashore?

A Yes sir.

Q Previous to that at sea?

A Previous to that at sea for 16 years.

Q A master mariner.

A Yes sir.

Q Have you been owner of vessels?

A Yes sir.

Q Insurer of vessels?

A Yes sir.

Q Ocean going ships?

A Yes sir.

Q Are you familiar with the San Francisco form of hull time policy of marine insurance?

A Fairly so. I have not examined one recently.

Q I will show you respondent's exhibit No. 1 for identification, and call your attention to the marginal endorsement, the following words: "Vessel warranted employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle," and ask you if you know what the understandinig of owners of insured property at San Francisco would be on a clause in that language relative to the time when the warranty takes effect?

MR. CAMPBELL: The question is, whether you know.

MR. GORHAM: Q If you do, say yes; if you do not, say no.

A Do I know what the general custom is?

Q What the general understanding is.

A I would know what my understanding was.

Q Do you know what the general understanding is among owners of floating property having occasion to insure and use such warranty?

A I don't know whether I should answer as to what others might figure. I know how I would figure on it.

Q State your knoledge, Captain?

MR. CAMPBELL: We object to the question on the ground that the witness has not been qualified, and further, it is asking for the opinion and conclusion of the witness, and tends to vary the terms of a written contract.

A I would judge that the warranty clause is a governing clause in the policy and would have to be followed. I believe it is a technical proposition, but I would still figure that it is perfectly plain.

MR. GORHAM: Q Is the warranty effective exclusively at the time that the policy attaches, or is the warranty effective during the term of the policy, in your opinion?

MR. CAMPBELL: The same objection.

A During the term of the policy.

CROSS EXAMINATION.

MR. CAMPBELL: Q By your opinion, Captain, do I understand you to mean that it is a warranty which touches the character of her employment?

A During the life of the policy, yes.

Q Under that warranty, would you expect your vessel to be held covered while she is laid up?

A I would be very doubtful about it, if I had not given written notification of any change.

Q We are not speaking of notification now. Would you as an owner regard your vessel as covered during that period, the policy running for one year?

A I think that there is a technical question there that is somewhat involved, but I would not consider that I was covered if I changed the condition of the risk as stated in the policy without notification and permission.

Q Would you consider that that warranty requires you to keep your vessel constantly and continuously in that particular trade and those particular waters, say from the 26th of June, 1908, to the 26th of June, 1909, without allowing it to lay up at all?

A Technically, yes. I mean by that, that if the vessel laid at a wharf at Seattle or anywhere within the radius of that policy, she would be covered.

MR. GORHAM: Q If in the waters of the policy?

A If in the waters of the policy, but I would be afraid technically, I would consider it from the technical point, but I would be somewhat doubtful if the vessel would be covered if she was taken outside the limits of that warranty.

MR. CAMPBELL: Q That is merely a matter of a personal opinion with you?

A Yes sir.

Q That is not based on any knowledge of the custom in the insurance trade at all regarding that particular?

A It is based on my experience of the custom.

Q Of the technical underwriters?

A Yes sir.

Q Would it be your opinion that that warranty required her to be constantly employed during the year?

A I am of the opinion that that warranty would mean what it states.

Q There is no doubt about that.

A That the vessel must be within that radius during that time unless otherwise provided by permission from the underwriters.

Q What would you say if she were laid up in waters that were tributary and which was the usual and customary and safe place for vessels of her character to be laid up in?

A My experience has taught me that still, that if it is outside of that warranty, that technical lapse or default has been committed in not giving written notice, if the vessel was taken outside of the limits of the policy.

Q If notice was given?

A If notice was givenl on the endorsement that is a totally different proposition. I am looking on this contract—I will tell you, very unwillingly, I do not want to give an underwriter an opportunity to get out on a technicality, as far as any evidence of mine is concerned. I am looking on this just as it is written, just as my experience has taught me to act. If I had that policy and were going to take that boat outside of that limit, I would give them that notice. If I had not, I would think I had got myself into trouble. That is the honest truth about it.

Q Did you ever have any experience with a warranty in those exact words?

A No sir, I think not.

Q You have never heard a warranty of that character discussed among the underwriters?

A No sir.

Q This is simply an opinion that is personal to yourself?

A Yes sir.

Q And based on your experience with policies containing very technical warranties?

A Yes sir. My experience is, that the text of policies have to be followed very carefully.

Q This warranty reads "Vessel warranted employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle." Is your construction of it that the words "employed in the general passenger and freighting business on Puget Sound" touches the character of her employment on Puget Sound?

A Yes sir; I think it governs the character of the employment.

Q Are you familiar with the Sound territory?

A Yes sir.

Q Are you familiar with what is known as the arm that runs into Bremerton, Port Orchard?

A Yes sir, I know that territory.

Q Would you say that this warranty permitted that vessel to trade in those waters?

A It would permit her to trade anywhere within a radius of thirty miles.

Q From Seattle?

A Yes sir.

Q On waters that were not necessarily the technical portion known and designated by the government as Puget Sound, but in those waters which empty into Puget Sound?

A I would say anywhere within a radius of thirty miles from Seattle. I think by the term "Puget Sound" in that warranty is meant the waters of Puget Sound; that is, actually the waters of Puget Sound and tributary waters.

I do not think I would confine it to the actual Sound proper. I would not put that construction on it.

Q Your consideration would be that it would even be the waters of Elliott Bay that may not be know as Puget Sound?

A Yes sir, Elliott Bay is where Seattle is located.

Q And that is what you consider an indentation or arm or tributary of what are technically as Puget Sound?

A Yes sir.

Q Do you know where the tide flats of Seattle are?

A Yes sir.

Q Do you know that there are certain parts of those tide flats to the south of the city which are navigable?

A Yes sir.

Q If it was customary to take vessels into those parts of the tide flats which are navigable, you would consider that your vessel was within the waters described here, would you not?

A Yes sir; I would consider she was within those waters, if they were navigable waters.

Q You would consider that she was covered while in those waters under this warranty?

A I would consider she was covered under that warranty if she was operating. I would not consider she was covered if she was laid up under that warranty.

Q Do you base that opinion on any knowledge of custom among the underwriters with a warranty of this particular character?

A No sir. I could not say that I know the custom. I used to think so, but I came to the conclusion I did not.

Q If the underwriters were notified that she was to be laid up you would consider that the laying her up in the waters I have last described would not be a breach of the warranty?

A Not unless they objected immediately.

Q You are familiar with the San Francisco form of hull time policy, are you not?

A Yes sir.

Q It is customary in the insurance trade to hold vessels covered while laid up under a yearly policy, is it not?

A Yes sir.

Q That has been your experience?

A Yes sir.

Q Your construction of this warranty simply touches the character of the employment?

A Yes sir, I think it is a special warranty.

RE-DIRECT EXAMINATION.

M. GORHAM: Q If this vessel could be navigated from Elliott Bay into Lake Washington, which is on the eastern boundary of Seattle, would you consider that Puget Sound?

A No sir.

Q A body of fresh water?

A I would not consider a navigation from Elliott Bay to Lake Washington as being navigation on Puget Sound.

Q You understand by Puget Sound the salt waters of that arm of the sea where the tide ebbs and flows?

A Yes sir, any ordinary tributary or indentation or bay in the salt waters of the bay. I think if you go up rivers or anything of that kind, that is not Puget Sound.

Q You would not consider Duwamish River, Puget Sound?

A No sir.

RE-CROSS EXAMINATION.

MR. CAMPBELL: Q That is, you mean when you are up what they call the Duwamish River?

A If you go off the Sound into any of the rivers you

are off the waters of Puget Sound, as a sailor would consider it.

Q If you are at that point where the waters of a river flow into a tributary of Puget Sound, say Elliott Bay, you would not consider that you were beyond the waters?

A I would consider that you are beyond the waters of Puget Sound just as soon as you went beyond the rise and the fall of the tide, outside of the salt water.

Q As long as you were within the rise and fall of the tide, and where the salt water reached the vessel, if that was right at the so-called indentation of Puget Sound, you would still consider it Puget Sound?

A You are getting down to a pretty fine question on that point of location. If you get off of the navigable waters of Puget Sound, I would not call it strictly Puget Sound. If you get into any of the rivers, how far you would have to go up any of those rivers before you get off the Sound is a question; you would not have to go very far. The moment you get into the mouth of the river you are off the Sound; there is no question of that.

Q The mouth of the river you describe as a place where this fresh body of water last passes between two well defined headlands?

A Yes sir. You are not in the river when you are on the tide flats.

Q You do not consider the mouth of Duwamish River right down at the tide flats?

A No sir. I could not define the exact location of Duwamish River, but I would not consider you were in the river when you were on the flats.

Q That is the land that is uncovered and covered by the flow of the tide at different seasons of the year?

A Yes sir, at ordinary rise and fall of the tide.

DEPOSITION OF EDGAR ALEXANDER.

State of California, City and County of San Francisco, ss.

EDGAR ALEXANDER, a witness produced on behalf of the respondent in the above entitled cause, having been duly sworn, testified as follows:

MR. GORHAM: Q State your full name?

A Edgar Alexander.

Q Your age?

A 60.

Q Your residence?

A San Francisco.

Q And your occupation?

A Adjuster of marine losses.

Q How long have you resided in San Francisco?

A Over 20 years.

Q How long have you been in the marine insurance business?

A About 40 years.

Q To what extent, Mr. Alexander, relative to covering the entire field, or have you been simply in one department of it?

A I have been engaged in marine insurance for that time in every department.

Q Have you represented marine underwriters?

A Yes sir. Marine insurance, I am speaking of.

Q Marine insurance companies?

A Yes sir.

Q What company?

A The Canton, New Zealand, and also engaged in the Thames & Mersey Insurance Company of Liverpool.

Q In San Francisco?

A In San Francisco.

Q Are you familiar with the San Francisco form of hull time policy of marine insurance?

A Yes sir.

Q I show you respondent's exhibit No. 1 and call your attention to the marginal endorsement in the following words: "Vessel warranted employed in the general pas-

senger and freighting business on Puget Sound within a radius of thirty miles from Seattle." Are you familiar with the general understanding of the marine underwriters at San Francisco relative to the construction of that clause?

A Yes sir.

Q Insofar as the time when it becomes effective or during which it is effective?

A Yes sir.

Q What is that understanding?

MR. CAMPBELL: I object to the question as calling for the opinion and conclusion of the witness, and tending to vary the terms of a written contract.

A No underwriter in San Francisco, or anywhere else, would understand it except in one way, and that was that it applied to the whole time insured by the policy.

Q The use of the word "employed" as a past participle without the use of any form of the auxiliary verb "to be" would not confine the warranty as read to you in that particular policy to the time when the policy attached?

MR. CAMPBELL: I renew the objection, and also that it is leading.

A No sir. It is merely a grammatical error to which many people are subject in expressing themselves.

MR. GORHAM: Q In other words, an idiom of the English language?

A Yes sir.

Q The word "employed" as there used has a future meaning as well as a present meaning?

MR. CAMPBELL: The same objection.

A It must have.

MR. GORHAM: Q Eliminating the particular employment or the particular water that is mentioned in the clause as I read it to you, I will ask you if that is a common form of endorsement of a warranty where the vessel is warranted employed in a certain trade and certain waters?

A Very common.

Q At San Francisco?

A Excluding this question of radius?

Q I mean excluding the locality?

A Warranted employed you mean?

Q The words "warranted employed" in so and so is a common form of warranty?

A Yes sir.

A At San Francisco?

A Yes sir.

Q Among the marine underwriters?

A Yes sir.

Q And so accepted by the assured.

A Yes sir.

Q How long has such a form prevailed? How long has it been customary for the underwriters to write policies and the assured to accept them in such form?

A Ever since I can remember.

Q Your memory is very good?

A I think so; pretty good on facts.

CROSS EXAMINATION.

MR. CAMPBELL: Q Your construction of that warranty, Mr. Alexander, is a warranty which touches the character of her employment?

A Not merely the character of the employment.

Q The character of the employment and the waters on which she may be employed?

A The principal object of this—

Q (Intg.) I am saying, your construction, as I understand it, is a warranty touching the character of her employment and the waters on which she may be employed?

A Yes sir.

Q Have you ever in your experience as an underwriter

endorsed that particular warranty in those exact words on a policy?

A Not the exact words, word for word, I don't suppose I did. Which words do you refer to?

Q I am referring to all the words.

MR. GORHAM: Q As a whole?

A I can speak as to some of them.

MR. CAMPBELL: Q As a whole, word for word, as that warranty reads, you have not, in your experience, endorsed that frequently upon a policy that you can recall?

A I should say leaving out this radius, we have.

Q I am asking you of that warranty in those exact terms?

A I don't remember the exact wording, word for word, of this clause.

Q Has it been your experience as an adjuster that the San Francisco Underwriters hold a vessel covering any San Francisco form of hull time policy while the vessel is laid up?

A Yes sir.

Q The policy does not provide for a return premium?

A No sir.

Q Whether return premium is made is a matter of subsequent adjustment between the underwriters and the assured?

A Yes sir.

Q Would it be your opinion that that warranty includes not only the waters which may be technically known as the waters of Puget Sound but the bays and arms and tributaries of Puget Sound in which there is a rise and fall of the tide in salt water which are navigable?

A I do not know anything about rise and fall of the tide. I consider that the warranty states that it would be employed in the waters of Puget Sound, and what are the waters of Puget Sound are to be determined as matters of geography.

Q What would be your opinion on it; would you not consider it would include the arms and bays?

A I am not competent to give any opinion upon the geographical limits of Puget Sound waters.

Q Would you consider it to include an indentation or bay of Puget Sound?

A An indention or bay?

Q Yes, which was tributary to Puget Sound?

A An indention or bay of Puget Sound, would in a general way I say include it.

Q For instance, you would not exclude Elliott Bay from the waters of Puget Sound?

A I don't know Elliott Bay.

Q You know the harbor of Seattle?

A A little.

Q You have been there?

A Yes sir.

Q Many times?

A Just three or four times.

Q For instance, if the policy read "San Francisco Bay" instead of "Puget Sound" would you consider it permitted the vessel to enter Oakland Creek and discharge a cargo there?

A Oakland Creek?

Q Yes, if it read "San Francisco Bay" instead of "Puget Sound"?

A No sir, I don't think I would.

Q Would you at Carquinez Straits?

A I only know what underwriters do in such cases. They would put "San Francisco Bay and or tributaries" if they meant to include those. It is a common form of expressing the privileges or the limitation, rather, as expressed in policies of insurance.

Q If they did not include the word "tributary" would you not consider that the vessel has a right to go into the mouth of Carquinez Straits and discharge the cargo?

A I do not care about giving an opinion on the particular spot. I am speaking of the general understanding of underwriters. Tributaries are very dangerous places in some cases. An underwriter that would permit a vessel to navigate the ocean, although the tributary is running into the ocean, would not accept the risk into the tributaries running into that ocean.

Q Your restriction and limitation upon tributaries would depend upon the safety of the tributaries?

A I am speaking about the custom of underwriters; for their protection the limit is prescribed, and if it prescribes ocean it does not include the tributary.

Q If this vessel were engaged in carrying general freight to various points around San Francisco Bay, and she should go into the mouth of Carquinez Straits and discharge say a load of hay, or take on a load of hay, you would not consider that she had broken that warranty, would you?

A Which warranty?

Q If the warranty reads "to be employed on the waters of San Francisco Bay"?

A If she went to Carquinez Straits?

Q To the mouth of Carquinez Straits?

A I would consider that she had broken the warranty, yes.

Q You do not think that San Francisco Bay would include the tributaries such as Carquinez Straits?

A The policy does not say "and tributaries"; it says "San Francisco Bayy" only.

Q Have you ever heard a warranty of this character, of these particular words, discussed among underwriters other than with reference to this particular case?

A As to the wording of it?

Q Yes.

A I have heard of this case.

Q I say other than this case?

A No sir. No question has ever been raised.

Q There has been considerable discussion among the underwriters in San Francisco about this case?

A Yes sir.

Q And a general resentment against the fact that a claim was made for the loss under the policy?

A Those subjects I do not wish to give any answer to, resentment or otherwise, against the company or against the claimant.

Q I do not mean spitework, but a feeling against the loss?

A You mean a matter of opinion?

Q Yes.

A Whether the loss is claimed or not?

Q The feeling among the underwriters that the loss should not be paid?

A I do not call that resentment. The claimants in this case think they have a claim. The underwriters think they have not. There is no resentment about it; it is a matter of opinion.

Q I do not mean resentment, hard feeling. We all recognize that every person has his legal right, and his right to enforce it, if he can, according to his idea.

A Yes sir.

Q It is a matter of business only with any of us.

A The underwriters have a right to exercise their opinions, naturally; that always comes up.

RE-DIRECT EXAMINATION.

MR. GORHAM: Q I wish you would look at that form of respondent's exhibit 1 for identification, and ask you if that is the usual hull time San Francisco form (handing)?

A Yes sir, they are copyrighted; they are all identical. I need not go through it.

MR. GORHAM: I offer this respondent's exhibit 1 for identification in evidence.

(The Notary marks the paper "Respondent's Exhibit 1").

MR. CAMPBELL: I shall reserve the right to further object to it, for the reason that I have not before me the original policy and have had no opportunity to make a comparison.

DEPOSITION OF JAMES JOHN THEOBALD.

State of California, City and County of San Francisco,ss.

JAMES JOHN THEOBALD, a witness produced on behalf of the libellant in the above entitled cause, having been duly sworn, testified as follows:

MR. CAMPBELL: Q You are the general agent for the Canton Insurance Office, Limited, Mr. Theobald?

A No sir; I am the manager for Parrott & Company, who are the general agents.

Q Which company is one of the respondents in this case?

A Yes sir, the Canton Insurance Office.

Q Was Frank Waterhouse & Company, Incorporated, of Seattle, the agent up there of the Canton Insurance Office, Limited?

MR. GORHAM: Our objection to the question is reserved. Will you state the time in your question.

MR. CAMPBELL: Yes.

Q At the time that this risk was placed with the Canton and the policy issued?

A My belief is that Mr. J. R. Mason was the agent at the time that the policy was issued.

Q Was he at that time in the employ of Waterhouse & Company?

A At that time he was the agent of the Canton, and subsequently sold or transferred his business to Frank Waterhouse & Company, Incorporated; that is, if the date is correct.

Q You do not know whether at that time his office was a part of the office of Frank Waterhouse & Company?

A Not to my knowledge.

Q You do not know just when he consolidated his interests?

A I could not tell you without looking up my records.

MR. GORHAM: I will now call you, Mr. Theobald, as a witness for the respondent.

DIRECT EXAMINATION.

MR. GORHAM: Q How long have you been in the insurance business, Mr. Theobald?

A About 23 years.

Q Marine insurance?

A Marine insurance.

Q In all its departments?

A In all departments of marine insurance, yes.

Q Are you an officer of the Board of Marine Underwriters of San Francisco, or a member of any of its committees?

A Yes sir; I am on the adjustment committee.

Q What are the duties of the adjustment committee?

A They examine all adjustments that are presented to them by the adjusters after they have been drawn up and examined, and then the adjustment is turned over to the underwriters for settlement with the insurance.

Q Are you familiar with the San Francisco form of hull time policy of insurance?

A Yes sir.

Q Are you familiar with the policy issued by the Canton Insurance Office in this particular case—generally, I mean?

A Yes sir.

Q Are you familiar with the marginal warranty endorsed on the original policy?

A Yes sir, I have seen this.

Q I call your attention to the marginal warranty

endorsed on respondent's exhibit No. 1 in the following terms: Vessel warranted employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle." Do you know what the general understanding of the marine underwriters of San Francisco is of such a warranty with respect to the time at which or during which it is effective? Just yes or no?

A Yes sir.

Q What is that understanding.

MR. CAMPBELL: We object to the question because it is calling for the opinion and conclusion of the witness, and tends to vary the terms of a written contract.

A That the vessel would have to be employed during the entire life of the policy.

MR. GORHAM: Q Eliminating the radius of 30 miles and eliminating the particular waters "Puget Sound" designated in that particular warranty which I have read to you, is that a common form of warranty in hull time policies in San Francisco, a vessel warranted employed in certain trades and waters?

MR. CAMPBELL: Objected to as immaterial and as having no bearing on the issues in the case.

A I have known policies issued with the warranty "warranted engaged" instead of "warranted employed."

MR. GORHAM: Q I am askikng you if the language "vessel warranted employed" is of common usage?

A "Employed" or "engaged".

Q I will ask you what the understanding is among marine underwriters as to the use of the word "employed" or "engaged" without the additional use of some form of the auxiliary verb to be, relative to whether the use of the word "employed" or "engaged" refers to future or only to present?

MR. CAMPBELL: Objected to as calling for the opinion of the witness, and asked for the purpose of tending to vary the terms of a written contract.

A It means warranted to be or will be employed during the life of the policy.

CROSS EXAMINATION.

MR. CAMPBELL: Q Under the San Francisco form of hull time policy in which the words "warranted employed" or "warranted engaged" are used, it is customary to recognize the right of the owner to be laid up and to be held covered during the laying up?

A Under the San Francisco hull form there is no provision made for laying up.

Q I say, it is customary to recognize the right to lay up and to be held covered during the laying up period?

A Only after application has been made to the insurance company to have the vessel laid up, and that application approved by the insurance company; and it is also the custom to state where the vessel shall be laid up or will be laid up.

Q You are the active manager of Parrott & Company, the agents for the Canton Insurance Company?

A Yes sir, the marine insurance manager.

Q As a member of the adjustment committee of the San Francisco Board, the adjustment of this loss was passed upon by you?

A I was not a member of the adjustment committee when it came up.

Q Do you know whether or not the adjustment was passed by the committee?

A I am not aware.

Q Are you not aware from your examination of the adjustment of the losses?

A I could not say without looking up our records; I really don't know.

Q Do you know of your own knowledge whether or not part of the insurers on this vessel at the time of this loss had paid their proportion of the loss?

A I understand that some of the interested insurance companies have paid but they had a different warranty.

Q A different warranty, or was it under the English form of policy?

A I don't know whether they had an English form. I know that some of the companies had a different form of warranty. The New Zealand Company had a form of warranty, and it said, "On Puget Sound or tributaries" or "and tributaries," I could no say which.

Q Are you sure of that?

A Yes sir.

Q Have you seen the warranty itself?

A I was in the office of the Firemen's Fund representative; I did not actually see the policy, but it was read in my presence.

MR. CAMPBELL: I move to strike that out as being hearsay.

RE-'DIRECT EXAMINATION.

MR. GORHAM: Q I show you an application from Johnson & Higgins, Seattle, Washington, addressed to the Canton Insurance Office, dated January 25th, 1908, covering some 10 or 15 vessels owned by Puget Sound corporations, or vessels plying in Puget Sound, and ask you generally what that paper is (Handing)?

A This is a covering note, covering a fleet of vessels belonging to several steamship lines of Seattle, and accepted by us for the amounts as stated.

Q Under the schedule?

A Yes sir. I might say that our signature does not appear on this form. It is not customary for the underwriter to sign his own form. The duplicate which they hold in their office is signed by the Canton Insurance Company.

Q The risks and the contract generally is in the terms of the covering note?

A Yes sir.

Q With special endorsements?

A Yes sir.

Q I call your attention to a particular warranty in typewriting at the bottom of the schedule under the word "Memo": "Warranted confined to the waters of Puget Sound, not north of Comax, nor west of Flattery," and

ask you if you know what the construction of the marine underwriters of San Francisco is upon the use of the word "confined" relative to the time when the warranty is effective or during which it is effective?

MR. CAMPBELL: Objected to as incompetent, irrelevant and immaterial, for the reason that it is not a warranty in the terms of the warranty on the policy in this case.

A It means to be confined during the term of the policy.

MR. GORHAM: Q Were policies written pursuant to this covering note, or is this the contract of insurance after being accepted by your office?

A In some instances, they have, and in some instances they have not, because the date of attachment has not yet applied.

MR. GORHAM: We offer this in evidence as Respondent's Exhibit 2.

(The Notary marks the paper "Respondent's Exhibit 2").

MR. CAMPBELL: We object to it as incompetent, irrelevant and immaterial, for the terms and conditions and warranties of it are not the same as the terms and conditions and warranties of the policies which are the subject of the action in the case at bar.

MR. GORHAM: Q I show you another paper and ask you what this is (Handing)?

A This is an application for a policy on the steamer "Titania," and we insured in San Francisco, Canton Policy No. 74,936, under the terms of this application.

Q With the special warranties and clauses and endorsements as shown by the application?

A Yes sir.

Q This is Johnson & Higgins' application?

A Yes sir.

Q I call your particular attention to the attached typewritten warranty in the following language: "Warranted confined to the Pacific Coast trade, not north of Comax nor

south of Valparaiso, but with liberty to proceed to ports and or places in the Hawaiian Islands." I will ask you whether the same general construction as you heretofore testified respecting the special warranty in the case at bar, and the special warranty in Respondent's Exhibit No. 2 will apply to the application on the "Titania" on the words "warranted confined"?

MR. CAMPBELL. I object to the question as being incompetent, irrelevant and immaterial, on the ground that the terms and conditions and warranties on the two applications are not the same as the terms and conditions and warranties of the policies in the suit at bar. And upon the further grounds that it is asking for the opinion and conclusion of the witness, and tending to vary the terms of a written contract, and on the further ground that the question is leading.

MR. GORHAM: Q Do you understand the question, Mr. Theobald?

A Yes sir. It would mean that the "Titania" would have to be confined to the waters as specified.

Q During what time?
A During the entire term of the policy.

MR. GORHAM: We offer this in evidence, as Respondent's Exhibit No. 3.

(The Notary marks the paper "Respondent's Exhibit No. 3").

MR. CAMPBELL: We object to it as incompetent, irrelevant and immaterial, for the reasons that the terms and conditions and warranties of the application are not the same as the terms and conditions and warranties in the policies in suit in the case at bar.

CROSS EXAMINATION.

MR. CAMPBELL: Q Under this warranty in the application marked Respondent's Exhibit 2, which reads "Warranted confined to the waters of Puget Sound, not north of Comax nor west of Flattery," whether it is your opinion or not that these vessels covered by this application, and the policies issued pursuant thereto, would be permitted to go into the tributary waters of Puget Sound?

A They are not.

Q If one of these vessels should go up Hoods' Canal, would you consider that a breach of this warranty?

A I should not consider any water—

Q (Intg.) That is not my question.

A I am answering it to the best of my ability; whether I would or not consider Hood's Canal—

Q Yes.

A I should consider Hood's Canal part of Puget Sound.

Q There are certain tributaries to Puget Sound that you consider part of Puget Sound, do you not?

A There are.

Q That is simply a matter of opinion which is as to what tributary is a part of Puget Sound and what tributary is not?

A It is not my opinion but the opinion of all underwriters.

Q It is your opinion in this case?

A Yes sir.

Q Under this warranty you would recognize the right of that vessel to go into the waters of the Straits of Juan de Fuca, would you not?

A Yes sir.

Q As a tributary of Puget Sound?

A Yes sir.

Q You would recognize her right to go into Elliott Bay, would you not?

A That is a part of Puget Sound.

Q As a tributary of Puget Sound?

A I think it is a part of Puget Sound.

Q Is it a part of what is technically known as Puget Sound, or a tributary to Puget Sound, or an indentation to Puget Sound?

A It is what is known as Puget Sound in the minds of all marine underwriters.

Q And is the southern part of Elliott Bay a part of the waters that are known to the underwriters as the waters of Puget Sound?

A I do not know what the southern part of Elliott Bay is.

Q You do not know?

A No sir.

Q Then the interpretation which is put upon the term "waters of Puget Sound" by the underwriters is not confined purely to that portion of the waters which are inside of Cape Flattery?

A In my opinion, it is not.

Q It includes certain of the arms and certain of the indentations which waters lead to that part which is technically known as Puget Sound?

A Yes sir.

United States of America, State and Northern District of California, City and County of San Francisco, ss.

I certify that, in pursuance of the stipulation hereunto annexed, on Tuesday, May 17th, 1910, at the hour of 9 a. m., before me ,CLEMENT BENNETT, a Notary Public in and for the City and County of San Francisco, State of California, at San Francisco, at the office of Messrs. Page, McCutchen & Knight, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared Louis Rosenthal, Harry Pinkham, Harry Stephenson Smith, Mitchell Thompson, John Barneson, Edgar Alexander and James John Theobald, witnesses called on behalf of respondents and James John Theobald produced on behalf of the libellant, in the cause entitled in the caption hereof. IRA CAMPBELL, Esq., appeared as proctor for the libellant, and WILLIAM H. GORHAM, Esq., appeared as proctor for the respondents, and the said witnesses, being by me first duly cautioned and sworn to testify the whole truth in said cause, and being carefully examined, deposed and said as appears by their depositions hereto annexed.

I further certify that said depositions were then and there taken down in shorthand notes by myself and were afterwards reduced to typewriting; and I further certify that, by stipulation of the proctors for the respective parties, the reading over of the depositions to the witnesses and the signing thereof was duly waived.

Accompanying the depositions and annexed thereto and forming a part thereof are Respondent's Exhibits 1, 2 and 3, introduced in connection therewith and referred to and specified therein. Such exhibits are endorsed by me with my official title.

And I do further certify that I have retained the said depositions in my possession for the purpose of mailing the same with my own hand to the Clerk of the United States District Court for the Western District of Washington, Northern Division, at Seattle, Washington, for whom the same were taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said depositions and caption named nor in any way interested in the event of the cause named in the said caption.

In Testimony Whereof, I have hereunto set my hand and seal at my office this 24th day of May, 1910.

CLEMENT A. BENNETT,

Notary Public in and for the City and County of San Francisco, State of California.

In the United States District Court for the Western District of Washington, Northern Division.

No. 3849.

INDEPENDENT TRANSPORTATION COMPANY, Libellant,

vs.

CANTON INSURANCE OFFICE, LIMITED, ET AL, Respondents.

Be it Remembered that on Thursday, February 2nd, 1911, pursuant to stipulation of counsel hereinafter set forth, at the office of Messrs. Page, McCutchen & Knight, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, JAMES P. BROWN, a United States Commissioner for the Northern District of California, to take acknowledgements of bail and affidavits, etc., W. H. LaBOYTEAUX and J. B. LEVISON, witnesses produced on behalf of the Libellant.

IRA CAMPBELL, ESQ., appeared as proctor for the libellant, and WILLIAM H. GORHAM, ESQ., appeared as proctor for the respondent, and the said witnesses, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is stipulated that the testimony of W. H. LaBoyteaux and J. B. Levison may be taken under Section 863 of the Revised Statutes of the United States, without the usual notice, and that the signature of the witnesses may be waived, and that it may be transcribed into typewriting and filed by the Commissioner, and used with the same force and effect as though the witnesses themselves had testified orally in court.

It is further stipulated and agreed between the proctors for the libellant and respondent that the testimony to be taken hereunder may be used in the case of the Independent Transportation Company vs. Canton Insurance Office, Limited, the case of the Independent Transportation Company vs. The China Traders Insurance Company, Limited, and the case of the Independent Transportation Company vs. Yang Tsze Insurance Association, Limited, all

consolidated under No. 3849, in the United States District Court for the Western District of Washington, Northern Division).

DEPOSITION OF W. H| LaBOYTEAUX.

State of California, City and County of San Francisco, ss.

W. H. LaBOYTEAUX, a witness produced on behalf of the libellant in the above entitled cause, having been duly sworn, testified as follows:

MR. CAMPBELL: Q What is your business, Mr. LaBoyteaux?

A Average adjuster and insurance broker.

Q Are you a member of any firm of insurance brokers?

A I am a member of the firm of Johnson & Higgins.

Q What is their business?

A Average adjusters and insurance; brokerage.

Q Is the firm of Johnson & Higgins engaged in the insurance brokerage business on this coast?

A It is.

Q Can you give me approximately the volume of business which is placed by your firm on this coast in the course of a year?

A What do you mean?

Q The volume of premiums?

A I do not know that I can. I should say in the neighborhood of two millions of dollars.

Q How long have you been engaged in this business on this coast?

A On the coast?

Q Yes?

A Since May, 1899.

Q Have you placed any insurance on hulls under the San Francisco form of hull time policy?

A I have.

Q I hand you three policies of insurance, which are

libellant's exhibits F, G and H, in this case, and ask you to examine the same, and with the exception of the marginal endorsements, I ask you whether these policies are the form known as the "San Francisco hull time policy"? (Handing).

A I notice that they are all marked "Hull Time San Francisco Form," and I assume that they are all in the general provisions about the same. You cannot tell exactly without comparing every word in the policy?

Q Is the San Francisco form a standardized form?

A More or less. There may be some slight variations from it according to the ideas of the different companies.

Q Are those slight variations indicated by endorsements on the standard form usual?

A Sometimes they are and sometimes there may be a variation in the body of the policy. These have every indication of being the usual form of San Francisco hull time.

Q I may say they have been so identified by witnesses called for the respondent. Do you know the custom prevailing among underwriters on this coast with respect to holding vessels, covered under the San Francisco form of hull time policy, while they are laid up. Answer yes or no?

A What is that question?

Q Read the question Mr. Reporter?

(The reporter reads the question).

A Yes sir.

Q Now, Mr. LaBoyteaux, under the San Francisco form of a hull time policy, I ask you whether or not it is the custom among underwriters on this coast to hold a vessel covered, while laid up, without notice of such laying up being given by the assured to the underwriter on the vessel and the latter's consent to such laying up obtained where there is no return of premium for the laying up period made to the assured?

A Yes sir. The return of premium is simply a matter of rebate to the assured by reason of the laying up.

Q Where no rebate is made is it under the custom necessary for the assured to give notice that he is going to

lay his vessel up in order that his vessel shall be held covered, during the period she is actually laid up?

A It is not necessary for him to give notice.

Q Is she held covered while she is laid up?

A Yes sir. The idea of notice is to secure a return of premium during the laying up.

Q Is that the only purpose?

A That is the only purpose.

Q That is the custom.

A Yes sir.

CROSS EXAMINATION.

MR. GORHAM: Q I understand your testimony, Mr. LaBoyteaux, is confined to the policies that have been submitted to you, assuming they are the usual form of San Francisco hull time policy, exclusive of the marginal endorsements on the policy. That was the question that counsel put to you. In the form of his questions he excluded the marginal endorsements?

A Yes sir.

Q I understand your answer excluded those marginal endorsements?

A They do not refer to the marginal endorsements.

Q Your answer is, taking into consideration the terms and conditions of the policy exclusive of the marginal endorsements?

A That is right.

DEPOSITION OF J. B. LEVISON.

State of California, City and County of San Francisco, ss.

J. B. LEVISON, a witness produced on behalf of the libellant in the above entitled cause, having been duly sworn, testified as follows:

MR. CAMPBELL: Q What is your business, Mr. Levison?

A Second vice-president of the Fireman's Fund Insurance Company.

Q What department of the business of the Fireman's Fund Insurance Company have you supervision of?

A The marine department.

Q Does that include the underwriting on hulls?

A It does.

Q The acceptance of insurance and issuance of policies on hulls?

A Yes sir.

Q How long have you been so engaged?

A In maritime underwriting?

Q Yes?

A About 32 years.

Q Have you any connection with the San Francisco Board of Underwriters?

A I have.

Q Is your company a member of that board?

A It is.

Q Were you ever connected with that board in an official capacity?

A Yes sir.

Q What office, if any, did you hold?

A I have held the office of president, a member of its adjusting committee, and a member of its surveyors committee, at different times.

Q How long were you president of the board?

A One year.

Q Do you know whether or not the Canton Insurance Company, and the Yang Tsze Insurance Company are members of the San Francisco Board?

A They are.

Q What is approximately the volume of business done by the Marine Department of the Fireman's Fund Insurance Company on this coast in a year in premiums?

A The volume in premiums?

Q Yes?

A Of course, we have a number of different standards of net premiums written by the company or gross premiums written by the office.

Q The gross marine insurance premiums?

A I should say roughly three quarters of a million a year; that as I say is approximate. I have not the figures in my mind.

Q How does the volume of marine insurance business done by your company compare with that of other companies doing business on the coast, so far as you know?

A Our office does the largest business of any company on the coast, if that is what you mean?

Q Yes. I hand you three policies of insurance, libellant's exhibits F, G and H, in this case, and with the exception of the marginal endorsements, I ask you, whether or not these policies are the form known as the "San Francisco form of a hull time policy?

A I have not, of course, the time to read them over, but they have that appearance, and I notice they are so entitled on the head and I presume the wording corresponds with what we call the San Francisco time.

Q Is that a standardized form of policy?

A Particularly yes.

Q Did you ever see that endorsement of San Francisco, whatever the endorsement is—

A San Francisco form.

Q —upon a policy which was not a San Francisco form?

A I never have.

Do you know, Mr. Levison, the custom prevailing among underwriters on this coast with respect to holding vessels, covered under the San Francisco form of hull time policy, while they are laid up?

A Yes sir.

Q Under the San Francisco form of a hull time policy, I ask you whether or not it is the custom among under-

writers on this coast to hold a vessel covered, while laid up, without notice of such laying up being given by the assured to the underwriter on the vessel and the latter's consent to such laying up obtained where there is no return of premium for the laying up period made to the assured?

A Read that over again, I have lost the first of it.

Q Read the question Mr. Reporter?

(The Reporter reads the question).

Do you understand the question now, Mr. Levison?

A No sir, I do not understand whether it calls for simply no or yes. It is rather a lengthy question.

Q I ask you whether or not it is the custom under the San Francisco form of a hull time policy, among underwriters on this coast to hold a vessel covered, while laid up, where there is no notice of such laying up given by the assured, and the latter's consent to such laying up obtained where there is no return of premium for the laying up period?

A It is, but I should like to explain in that connection almost invariably such notice is given for the purpose of obtaining return premium.

Q We have nothing to do with that feature of it in this case.

A I understand, but a hull time policy undoubtedly covers a vessel while she is laid up.

Q Whether or not notice of the laying up has been given?

A Whether or not notice of the laying up has been given.

Q In answering this question you have disregarded any endorsements that appear on the margin of the policy?

A Yes sir. I have simply dealt with the San Francisco form.

Q That is to what my question is directed?

A Yes sir.

CROSS EXAMINATION.

MR. GORHAM: Q As to whether or not a particular policy, San Francisco form of hull time policy actually covered a vessel while she was laid up would depend upon the terms and conditions of the policy itself including all its endorsements, would it not?

A I would say so naturally.

Q So that to determine in any specific instance whether a particular vessel insured under a San Francisco form is covered while she is laid up, you would have to examine the entire contract of insurance to determine for yourself?

A I would say naturally, yes.

Q You are now only testifying to the general form—in answer to questions by counsel for the libellant, you are testifying with reference to the general San Francisco form, the general form, without reference to the specific endorsements that might be put on the particular policy?

A Yes sir. I will go a bit further by saying I had in mind the general practice as applied to the usual form of hull time.

Q That practice would be varied according to the stipulations endorsed on the particular policy?

A Undoubtedly.

Q And that was governed in this specific instance?

A Yes sir.

United States of America, State and Northern District of California, City and County of San Francisco, ss.

I, JAMES P. BROWN, a United States Commissioner for the Northern District of California, do hereby certify that in pursuance of the stipulation hereunto annexed on Thursday, February 3rd, 1911, at the office of Messrs. Page, McCutchen, Knight & Olney, I was attended by IRA CAMPBELL, ESQ., proctor for the libellant, and WILLIAM H. GORHAM, ESQ., proctor for the respondent, and by the witnesses who were of sound mind and lawful age, and that the witnesses were by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause; that said depositions were, pursuant, to the stipulation of the proctors for the respective

parties hereto taken in shorthand by CLEMENT BENNETT, and afterwards reduced to typewriting; that the reading over and signing of said depositions of the witnesses was by the aforesaid stipulation expressly waived.

I further certify that I have retained the said depositions in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of Washington, Northern Division at Seattle, Washington, the court for which the same were taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

In Witness Whereof, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 8th day of February, 1911.

(Seal) JAS. P. BROWN.

U. S. Commissioner, Northern District of California, at San Francisco.

In the United States District Court for the Western District of Washington, Northern Division.

Consolidated under No. 3849.

INDEPENDENT TRANSPORTATION COMPANY, Libellant,

vs.

CANTON INSURANCE OFFICE, LIMITED, ET AL, Respondents.

ORDER PUBLISHING DEPOSITIONS.

Upon stipulation of the parties,

It is Ordered that the depositions of Louis Rosenthal et al, taken on behalf of respondents before Clement Bennett, notary public at San Francisco, California, May 17, 1910, and of W. H. LaBoyteaux et al, taken on behalf of libellant before James P. Brown, United States Commissioner at San Francisco, California, on February 2, 1911, be published.

Dated Seattle, Washington, March, 15, 1911.

C. H. HANFORD, Judge.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Mar. 15, 1910. R. M. Hopkins, Clerk.

United States District Court, Western District of Washington, Northern Division. In Admiralty.

No. 3849.

Filed Dec . 1st, 1913.

INDEPENDENT TRANSPORTATION COMPANY, Libellant,

vs.

CANTON INSURANCE OFFICE, LIMITED, ET AL, Respondents.

Ira A. Campbell, Kerr & McCord, for Libellant.
William H. Gorham, for Respondents.

Neterer, District Judge.

On July 3, 1907, the respondents, Yang Tsze Insurance Association, Canton Insurance Office, and the China Traders' Insurance Company, issued to libellants policies on insurance in the sum of $3,000, $4,000 and $2,000, respectively, upon the steamer "Vashon," each policy bearing an endorsement as follows:

"Warranted employed in the general freight and passenger business on Puget Sound within a radius of thirty miles from Seattle."

The policies were for a term of one year. Separate actions in admiralty were commenced against the respondent insurance companies, which actions were consolidated for trial by order of court. The vessel was running from Seattle to Alki Point, carrying chiefly passengers. She continued in that business until she was laid up sometime in August. She was moored at King Street dock, Seattle Harbor, until the 3rd of December, when she was taken to Duwamish River, emptying into Elliott Bay. The steamer sunk on the 15th day of December, 1907. Soon thereafter operations were commenced to save and preserve the vessel under the supervision of E. E. Gibbs, surveyor for the San Francisco Board of Underwriters, and Frank Walker, a marine surveyor, both of these men being employed by the owners of the vessel. Gibbs was not authorized to act for the respondents, but gave them information with relation to the progress of the work and the condition of the vessel. December 20, 1907, the respondents were notified of the accident and informed that the vessel was being raised under the superintendence of Gibbs and Walker. On Jan-

uary 11, 1908, she was floated and moored and found in such condition that it was impossible for the surveyors to determine the extent of the injuries, and upon the recommendation of the surveyors she was hauled out of the water and strakes removed from her hull, so that she could be cleaned and a detailed survey made. On January 27th a contract was entered into with P. D. Sloane to have the vessel hauled out. On February 16, 1908, the vessel was delivered to Mr. Sloane for that purpose, and on March 18th the vessel was taken out of the water, strakes removed, hull cleaned, and Gibbs and Walker made a preliminary survey, and recommended, in view of its damaged condition, that the vessel be sold. On March 31st, some of the underwriters other than the respondent agreed to a sale, the price to be approved by Mr. Gibbs. On April 15th, no satisfactory offer having been obtained, Gibbs and Walker proceeded to and completed their detailed survey of the damage, on receipt of which libellants concluded to abandon the vessel to the underwriters, and so notified the Board of Underwriters in San Francisco by wire, and on April 16th served formal notice of abandonment.

The respondent contends that the warranty upon the policy was a continuing condition upon the ship's employment during the time covered by the policy; that the vessel not being engaged in the traffic designated in the warranty at the time of the loss, no liability attached; and further contends that the abandonment of the vessel was not timely; also contends that the vessel was sold by the owners and the libellants in this case during the time that it was covered by the policies and the policies lapsed by reason of such sale; that the Duwamish River, the place where the boat was laid up was without the limits prescribed by the warranty upon the policy.

The testimony shows that from the time the vessel was sunk reasonable diligence was exercised by the owners to float the vessel and to ascertain the extent of the damage. The owners of the vessel employed marine surveyors, one of whom was Mr. Gibbs, who represented the San Francisco Board of Underwriters, to take charge of the raising of the vessel and ascertain the extent of the damage. All of the testimony shows that reasonable care was exercised in arranging for the raising of the vessel, although the speed expected was not realized. There is no testimony on the

part of the respondents upon this subject. There is nothing which shows the libellants negligent. As soon as the extent of the damage was ascertained, the Board of Underwriters, the respondents included, were immediately notified of the abandonment.

The testimony also shows that during the month of August, 1907, certain negotiations for the sale of the steamer "Vashon" to the Katalla Campony were inaugurated by C. P. Converse, assistant to the president of the Katalla Company, in the latter's absence. Converse in the president's name submitted the character of the vessel and purchase price to Mr. Eccles, the general manager, and his authorization was requested to complete the purchase. This telegram was confirmed by letter signed by Converse in the president's name with the initial "C" affixed. Eccles testified that he did not know whose handwriting the signature was but "would imagine" it was that of Converse. Eccles telegraphed authorization for the purchase, subject to proper inspection, in which he requested to have John Rosene join. Rosene reported boilers and machinery in good condition. A receipt for the vessel was signed by Converse, in which the Katalla Company agreed to pay libellant $25,500, upon receipt of a proper bill of sale. A proper bill of sale was delivered to and accepted by Converse for the Katalla Company and passed as correct and in legal form by the counsel for the Katalla Company. The voucher was prepared by the auditor of the Katalla Company, but the treasurer of the company, Captain Jarvis, refused to sign the check for the purchase price and telegraphed Eccles:

Katalla Company has arranged with your authority to buy vessel for Copper River $25,500 * * * I would not pay $5,000 for her * * * Have declined to pay. Please withdraw authority.

The treasurer of the Katalla Company continued to refuse to sign the check and notified libellant on August 10, 1907, that the purchase would not be consummated. Eccles and the president of the Katalla Company denied authority of Converse to bind the Company. On August 15th, libellant commenced suit against the Katalla Company for $25,500, the purchase price. On April 4, 1908, an agreement was reached between libellant and the Katalla Company whereby the action commenced by the Katalla Company was thereafter dismissed, upon the Katalla

Company paying $5,000. The agreement recites that libellants have incurred large expenses in maintaining the steamer, and had suffered losses by suspending operations of the steamer which the Katalla Company was desirous of aiding them to recuperate without ratifying the alleged purchase by Converse.

The testimony further disclosed by a strong preponderance of the evidence that the form of policy in issue, referred to as the "San Francisco Hull Time Policy" covers a vessel when laid up. The following witnesses, produced on the part of the respondent, in cross-examination said:
Rosenthal:

"They are usually held covered, especially when laid up in customary and usual places."
Pinkham:

"The San Francisco policy will cover a vessel at all times, whether laid up or in commerce."
Smith:

"An underwriter would always prefer to have the vessel laid up than going * * * If notification is sent them with the policy, an endorsement is made thereon reducing the premium and covering the risk while laid up.

"Q Supposing there is no reduction of premium?

"A I would not consider it necessary for me to notify the company in that case.

"Q They would be held covered where they were laid up any way?

"A I think they would be held covered while laid up, whether they notified the company or not."
Thompson:

"Q Under the San Francisco form of hull time policy, such as this, does the trade hold the vessel covered while she is laid up, if there is no return premium?

"A In my opinion they do, if the hazard is not increased I should like to add, by so doing."
Barneson:

"Q Did you ever have any experience with a warranty in these exact words?

"A I think not.

"Q You have never heard a warranty of that character discussed among the underwriters?

"A No sir, I think not."

Taylor for libellant states that it is customary for vessel under form of policy in issue to be covered while laid up.

The fact that negotiations were entered into for the purpose of sale or purchase of the steamer "Vashon" would not avail the respondents anything, unless the negotiations resulted in a consummated transaction. It is very evident from the testimony in this case that the beginning of negotiations were not from an authoritative source, that the course was interrupted and the vessel never delivered. The possession always remained with the libellants. The signing of a receipt by Converse for the vessel, under the circumstances shown by the testimony, would not transfer title as against the unpaid purchase price and possessory title of libellants. All of the testimony shows that the transaction was never comsummated; possession was never surrendered, nor attempt made by one authorized to acknowledge receipt of possession for the Katalla Company; hence this would not jeopardize any rights of the libellants in the insurance policies. The reason for a stipulation in an insurance policy against change of ownership is very apparent. The moral hazard in insurance is large, and the change of ownership from a desirable to an undesirable party is material, and under the law any change is fatal to the life of a policy. In the instant case the possession never passed; no authority or influence of any kind or nature had operation upon or over the vessel, hence could not affect the risk.

The testimony in this case, I think, reasonably shows that the place where the boat was moored or laid up at the mouth of the Duwamish River is within the limits prescribed by the policy. There is testimony that this was a customary and usual place where vessels were laid up, and was considered safe in shipping circles; it is a place where the tide ebbs and flows, and is on Elliott Bay only a short distance from the city of Seattle. The Supreme Court of Texas in *Insurance Company v. Clarke,* 157 S. W. 291:

'Appellant contends that the words 'gulf waters' should be construed according to their plain, ordinary meaning, and

that so construed, gulf waters are waters of the gulf, and that river waters became gulf waters when they have flowed down into the gulf, and, conversely gulf waters became river waters, when by the action of the tides and winds they have flowed or have been blown into rivers that as long as water is in the river, it is river water, and as long as it is in the gulf, it is gulf water, and that therefore the provisions of the policy which limited the tug to gulf waters, meant just gulf waters and not waters of rivers''

The court holds that this contention is too narrow; that the vessel was covered while in the tidal waters of the river, following the case of *Waring v. Clarke*, 46 U. S. 441, in which the Supreme Court defines the ''sea'' to mean not alone 'high seas' but the 'arms of the sea', 'waters flowing from it into ports and havens and as high up rivers as the tide ebbs and flows.' The Texas Court adds: 'If such be the sea, certainly gulf waters may be construed to mean the waters as high up as the tide ebbs and flows.' Again 'that waters within the ebb and flow of the tides are considered the sea is decided in the matter of Gwin's Will. 1 Tuck. 44; also in the case of *Cole v. White*, 26 Wend. 516.''This language with greater force applies here.

The contention that no liability could attach because of a breach of warranty in the policy, in that the vessel was laid up and not employed in the general passenger and freighting business on Puget Sound is not well founded. This was presented to Judge Hanford, and the reasons then given express my views as to the use of the word ''employed'', when used in connection with the evidence in this case.

Respondent cites the following authorities:

Robertson v. Insurance Co., 91 N. E. 372;
Hearne v. Marine Ins. Co., 20 Wall. 488, 94;
Wilson v. Gray, 127 Mass. 98;
United States v. Catherine, 25 Fed. Cas. 332;
United States v. Morris, 39 U. S. 464;
United States v. Buchanan, 8 How. 83;
Moran v. Prather, 23 Wall. 492;
1 Parson on Marine Insurance, 337;
1 Phillips Insurance, (3d ed.), Sec. 754, 762;
1 Arnold, (2d ed. by Perkins), Sec. 213, 214;
Hazzard v. Northeast Ins. Co., 8 Pet. 557, 80;
Pearson v. Conn. Ins. Co., 1 App. Cas. 498;

2 Aspinwall's Marine Cases, 100;
In Birrell v. Dryer, 9 App. Cas. 345;
5 Aspinwall's Marine Cases, 267;
Slinkard v. Manchester Fire Insurance Co., 122 Cal. 595; 55 Pac. 417;
Bernicia Agr. Works v. Germania Ins. Co., 97 Cal. 468;
Mawhinney v. Ins. Co., 98 Cal. 184;
Woods, Insurance, Sec. 47;
2 Arnold, Insurance, pp. 998, 1052 ;
2 Parsons Marine Insurance.

Libellant presents the following:

Templeton on Marine Insurance, p. 47;
Owens' Digest Marine Insurance, p 76;
Young v. Union Ins. Co., 24 Fed. 279;
Copeland v. Phoenix, 1 Woolworth, 278;
Marshall v. Insurance Co., 4 Cranch 202;
Hurtin v. Phoenix Ins. Co., 1 Wash. U. S. C. C. 400;
Maryland v. Ruden, 6 Cranch, 338;
Livingston v. Ins. Co., 7 Cranch 506;
Cosley v. Company, 22 Am. Dec. 337;
Radcliff v. Coster, 1 Hoff. Ch. 98;
Insurance Company v. Copelin, 76 U. S. 461;
Hume v. Frens, 150 Fed. 502;
Soelberg v. Insurance Company, 119 Fed. 23;
Washburn v. Insurance Company, 82 Fed. 296;
Harvey v. Insurance Co., 79 N. W. 895, 900;
Titlemore v. Vermont Mutual Ins. Co., 20 Vt. 546;
Hitchcock v. Insurance Company, 26 N. Y. 68;
Bell Ins. Co., 5 Robb. 423;
Worthington v. Bearse, 12 Allen 382;
Carroll v. Insurance Co., 8 Mass. 515;
Power v. Ins. Co., 19 Louis 28;
Howard v. Insurance Co., 3 Denio 301;
1 Phil. Ins., Sec. 89;
Whitney v. Insurance Co., 59 Pac. 897;
Insurance Company v. Asbury, 27 S. E. 667;
Hill v. Insurance Co., 59 Pa. St. 474;
Insurance Co. v. Kelly, 32 Md. 421;
Power v. Ocean Ins. Co., 19 L. R. A. (NS) 28;
Independent Transportation Co. v. Canton Insurance Office, 173 Fed. 564;
2 Cook on Corporations, p. 719;
Fregang v. R. R. Co., 154 Fed. 640;
3 Cook on Corporations, 716, 717;

Manning v. Gist, 3 Dougl. 74;
Harrington v. Halkeld, 2 Park. Ins., 634;
Jeffry v. Lyender, 3 Lev. 32;
Park on Insurance, 96th ed.
2 Arnold on Insurance 1022;
Byron v. Insurance Co., 25 Wend. 617;
Evans v. Insurance Co., 44 N. Y. 146;
DePayster v. Insurance Co., 19 N. Y. 272;
Wallenstein v. Insurance Co., 44 N. Y. 203;
McCall v. Insurance Co., 66 N. Y. 503;
Robinson v. Insurance Co., 68 N. Y. 192;
Peele v. Insurance Co., 3 Mason 27;
Nash on Insurance, 482;
Mills v. Fletcher, 1 Dougl. 219;
Bullard v. Insurance Co., Fed. Cases No. 2122, 1 Carter, 148;

Without analyzing the various authorities or entering upon a further discussion, it is concluded that libellants are entitled to recover the amount of the policies, and it is directed that a decree be entered accordingly.

JEREMIAH NETERER,
Judge.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington Northern Division, Dec. 1. 1913. Frank L. Crosby, Clerk. By B O W Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 3848

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LTD., Respondent,

No. 3849

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CANTON INSURANCE OFFICE, LTD., Respondent,

No. 3858

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CHINA TRADERS INSURANCE COMPANY, Respondent.

FINAL DECREE.

This cause coming on to be heard at this term, the said three causes above entitled having been consolidated by order of this court, and the same was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

I.

That the libelant, Independent Transportation Company, a corporation, do have and recover of and from the Yangtsze Insurance Association, Limited, a corporation, the sum of $2850, the proportionate part of said Company's loss of the steamer Vashon, and the further sum of $846.12; being the proportionate part of said respondent's proportion of the expenses incurred in laboring to save and preserve said steamer by way of salvage charges and costs of making adjustment, together with interest on said aggregate sum of $3696.12 at the rate of six per cent per annum from April 15th, 1908, in the sum of $1256.68, or a total of $4952.80, and in addition thereto three-ninths of the costs to be herein taxed.

II.

It is further ordered, adjudged and decreed that the libelant, Independent Transportation Company, do have and recover of and from the Canton Insurance Offices, Limited, a corporation, the sum of $3800.00, the proportionate part of said Company's loss of the steamer Vashon, and the further sum of $1128.16, being the proportionate part of said respondent's proportion of the expenses incurred in laboring to save and preserve said steamer by way of salvage charges and cost of making adjustment, together with interest on said aggregate sum of $4928.16 at the rate of six per cent per annum from April 15th, 1908, in the sum of $1675.57, making a total of $6603.73, and in addition thereto four-ninths of the costs to be herein taxed.

III.

It is further ordered, adjudged and decreed that the libelant, Independent Transportation Company, do have and recover of and from the China Traders Insurance Company, a corporation, the sum of $1900, the proportionate part of said company's loss of the steamer Vashon, and the further sum of $564.08, being the proportionate part of said respondent's proportion of the expenses incurred in laboring to save and preserve said steamer by way of salvage charges and costs of making adjustment, together with interest on said aggregate sum of $2464.08 at the rate of six per cent per annum from April 15th, 1908, in the sum of $837.78, or a total of $3301.86, and in addition thereto two-ninths of the costs to be herein taxed.

IV.

And it is further ordered, adjudged and decreed that unless this decree be satisfied or proceedings thereon be stayed on appeal within the time limited and prescribed by the rules and practice of this court, the libelant have execution against each of the several respondents for the sums aforesaid and said costs to satisfy this decree.

Dated at Seattle, Washington, December 15th, 1913.

JEREMIAH NETERER,
Judge.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 15, 1913. Frank L. Crosby, Clerk, by E. M. L., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

In Admiralty.

No. 3848

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LIMITED, a corporation, Respondent.

No. 3849

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

CANTON INSURANCE OFFICE, LIMITED, Respondent.

No. 3858

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CHINA TRADERS INSURANCE COMPANY, Respondent.

Consolidated under Cause No. 3849.

SUMMONS AND SEVERANCE.

To the China Traders Insurance Company, a corporation, respondent, in the above entitled cause No. 3858, consolidated with said causes Nos. 3848 and 3849 under No. 3849.

You are hereby invited to join with the Yang-Tsze Insurance Association, a corporation, and the Canton Insurance Office, Limited, a corporation, above named respondents, in said Causes Nos. 3848 and 3849, consolidated with said cause No. 3858 under Cause No. 3849, on the 30th day of December, 1913, and prosecute an appeal in the above entitled causes, consolidated under No. 3849, to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree in the above entitled causes Nos. 3848, 3849 and 3858, consolidated as aforesaid, under cause No. 3849, rendered and entered on December 15, 1913, by said

United States District Court for the Western District of Washington, Northern Division, sitting in Admiralty, or you will be deemed to acquiesce in said decree and the said Yang-Tsze Insurance Association, a corporation, and Canton Insurance Office, Limited, a corporation, respondents as aforesaid, shall prosecute said appeal without joining you as appellant.

Dated Seattle, Washington, December 27, 1913.

YANG-TSZE INSURANCE ASSOCIATION,
By Wliliam H. Gorham, Its Proctor,

CANTON INSURANCE OFFICE, Limited,
By William H. Gorham, Its Proctor.

Due and timely service of the above summons and severance by copy at Seattle, Washington, is hereby acknowledged this 27th day of December, 1913, and said invitation to join in the prosecution of said appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby declined and refused.

Dated Seattle, Washington, December 27, 1913.

CHINA TRADERS INSURANCE COMPANY,
By William H. Gorham, Its Proctor,

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 30, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

In Admiralty.

No. 3848

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LIMITED, a corporation, Respondent.

No. 3849

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CANTON INSURANCE OFFICE, LTD., Respondent,

No. 3858

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CHINA TRADERS INSURANCE COMPANY, Respondent.

Consolidated Under Cause No. 3849.

These Causes Nos. 3848 and 3849, consolidated with cause No. 3858 under Cause No. 3849, coming on for hearing upon the application of the respondents, Yang Tsze Insurance Association and Canton Insurance Office, Limited, for an order fixing the amount of the bond to stay the execution of the final decree against said respondents, Yang-Tsze Insurance Association and Canton Insurance Office, Limited, heretofore on December 15, 1913, rendered, made and entered in said cause upon appeal from said decree by said respondent, Canton Insurance Office, Limited,

The Court being fully advised in the premises,

It is ordered:

1. That the bond which said respondent Yang-Tsze Insurance Association shall give, in addition to the sum of two hundred and fifty ($250.00) dollars for costs on appeal, to stay the execution of the final decree against said res-

pondent Yang-Tsze Insurance Association heretofore on December 15, 1913, rendered and entered in said consolidated cause in said District Court, shall be the further sum of six thousand ($6000.00) dollars, conditioned according to law.

2. That the bond which said respondent Canton Insurance Office, Limited, shall give, in addition to the sum of two hundred and fifty ($250.00) dollars for costs on appeal, to stay the execution of the final decree against said respondent Canton Insurance Office, Limited, heretofore on December 15, 1913, rendered and entered in said consolidated cause in said District Court shall be the further sum of seven thousand five hundred ($7500.00) dollars, conditioned according to law.

Dated Seattle, Washington, December 30, 1914.

JEREMIAH NETERER,
Judge.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 30, 1913. Frank L. Crosby, Clerk; Ed. M. Lakin, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

In Admiralty.

No. 3848

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LIMITED, a corporation, Respondent.

No. 3849

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CANTON INSURANCE OFFICE, LTD., Respondent,

No. 3858

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CHINA TRADERS INSURANCE COMPANY, Respondent.

Consolidated Under Cause No. 3849.

NOTICE OF APPEAL.

To the Independent Transportation Company, a corporation, the above named Libellant, in Causes Nos. 3848, 3849 and 3858, consolidated under No. 3849, and to Ira A. Campbell, Esquire, and Messrs. Kerr & McCord, Its Proctors:

To China Traders Insurance Company, a corporation, the above named Respondent in Cause No. 3858, consolidated with said Causes Nos. 3848 and 3849 under No. 3849, and to William H. Gorham, Esquire, Its Proctor:

You and each of you will please take notice that the Yang-Tsze Insurance Association, a corporation, and the Canton Insurance Office, Limited, a corporation, the above named respondents in Causes Nos. 3848 and 3849, consolidated with Cause No. 3858 under Cause No. 3849, hereby appeal from so much of the final decree of the above entitled court in said causes Nos. 3848, 3849 and 3858 consolidated under No. 3849, as is in favor of said libellant and against

the said respondent, the Yang-Tsze Insurance Association in the sum of forty-nine hundred and fifty-two and 80/100 ($4952.80) dollars and in addition thereto three-ninths of the costs therein taxed at $186.36 and as in favor of said libellant and against the said respondent, Canton Insurance Office, Limited, in the sum of sixty-six hundred and three and 73/100 ($6603.73) dollars and in addition thereto four-ninths of the costs therein taxed at $186.36 and as orders, adjudges and decrees that unless said decree be satisfied or proceedings thereon be stayed on appeal within the time limited and prescribed by the rules and practice of this court, said libellant have execution against each of the said several respondents for the sums so decreed and costs, as aforesaid, to satisfy said decree, which said decree was made, entered and filed in said causes Nos. 3848, 3849 and 3858, consolidated under No. 3849, on the 15th day of December, 1913, to the United States Circuit Court of Appeals, for the Ninth Circuit.

YANG-TSZE INSURANCE ASSOCIATION,
CANTON INSURANCE OFFICE, LIMITED.
Respondents in said Causes Nos. 3848 and 3849, consolidated with said Cause No. 3858 under No. 3849.

WILLIAM H. GORHAM,
Proctor for Respondents,
Yang-Tsze Insurance Association and
Canton Insurance Office, Limited.

United States of America, Western District of Washington. —ss.

Due service of the within notice of appeal after the filing of the same in the office of the Clerk of the above entitled court,, admitted this 30th day of December, 1913, at Seattle, Washington.

KERR & McCORD,
IRA CAMPBELL,
Proctors for above named Libellant, Independent Transportation Company.
WILLIAM H. GORHAM,
Proctor for China Traders Insurance Company, a corporation, respondent in said Cause No. 3858 consolidated with Causes Nos. 3848 and 3849 under No. 3849.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 30, 1913. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

CANTON INSURANCE OFFICE LIMITED, a corporation,
THE YANG-TSZE INSURANCE ASSOCIATION, a corporation, Appellants,

vs.

INDEPENDANT TRANSPORTATION COMPANY, a corporation,
THE CHINA TRADERS INSURANCE COMPANY, a corporation, Appellees.

APPEAL BOND.

Know All Men by these Presents, That we, Canton Insurance Office, Limited, a corporation, one of the respondents above named, as principal, and Equitable Surety Company, of St. Louis, Missouri, as surety, are held and firmly bound unto the Independent Transportation Company, a corporation, libellant, above named, in the full and just sum of seven thousand seven hundred fifty ($7750.00) dollars, lawful money of the United States of America, to be paid to the said Independent Transportation Company, its successors and assigns for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 31st day of December, 1913.

Whereas, lately, to-wit: On December 15, 1913, at a District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court between said Independent Transportation Company and Yang-Tsze Insurance Association, Canton Insurance Office, Limited, and China Traders Insurance Company, a final decree was rendered severally against said Yang-Tsze Insurance Association, Canton Insurance Office, Limited, and China Traders Insurance Company, and in favor of said Independent Transportation Company, and the said Canton Insurance Office, Limited, together with the Yang-Tsze Insurance Association, a corporation, respondents above named, having filed and served a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree complained of, to reverse the said final decree,

and having obtained a citation directed to said Independent Transportation Company and to the China Traders Insurance Company, a corporation, one of the respondents above named of date December 30, 1913, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in said circuit, within thirty days from the date thereof.

Now, the condition of the above obligation is such that if the above bounden, Canton Insurance Office, Limited, shall prosecute its appeal to effect and pay the costs if the appeal is not sustained and shall abide by and perform whatever decree may be rendered by said United States Circuit Court of Appeals for the Ninth Circuit, in the cause, or on the mandate of said United States Circuit Court of Appeals for the Ninth Circuit by the Court below, then this obligation to be void, otherwise to be and remain in full force and effect.

CANTON INSURANCE OFFICE, LIMITED,
By William H. Gorham, Its Proctor and Agent (L.S.)
EQUITABLE SURETY COMPANY,
By Walter Morris, Its Attorney in Fact (L.S.)

The foregoing bond approved this 15th day of Jan., 1914. JEREMIAH NETERER, Judge.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 31, 1913. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CANTON INSURANCE OFFICE LIMITED, a corporation,
THE YANG-TSZE INSURANCE ASSOCIATION, a corporation, Appellants,

vs.

INDEPENDENT TRANSPORTATION COMPANY, a corporation,
THE CHINA TRADERS INSURANCE COMPANY, a corporation, Appellees.

APPEAL BOND.

Know All Men by these Presents, That we, Yang-Tsze Insurance Association, a corporation, one of the respondents

above named, as principal, and Equitable Surety Company of St. Louis, Missouri, as surety, are held and firmly bound unto the Independent Transportation Company, a corporation, libellant, above named, in the full and just sum of six thousand two hundred fifty ($6250.00) dollars, lawful money of the United States of America, to be paid to the said Independent Transportation Company, its successors and assigns for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 31st day of December, 1913.

Whereas, lately, to-wit: on December 15, 1913, at a District Court of the United States for the Western District of Washington, Northern Division, in a suit depending in said court between said Independent Transportation Company and said Yang-Tsze Insurance Association, Canton Insurance Office, Limited, and China Traders Insurance Company, a final decree was rendered severally against said Yang-Tsze Insurance Association, Canton Insurance Office, Limited, and China Traders Insurance Company, and in favor of said Independent Transportation Company, and the said Yang-Tsze Insurance Association, together with the Canton Insurance Office, Limited, above named respondents, having filed and served a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree complained of, to reverse the said final decree, and having obtained a citation directed to said Independent Transportation Company and to the China Traders Insurance Company, a corporation, one of the respondents above named, of date December 30, 1913, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in said Circuit, within thirty days from the date thereof.

Now, the condition of the above obligation is such that if the above bounden, Yang-Tsze Insurance Association, shall prosecute its appeal to effect and pay the costs if the appeal is not sustained and shall abide by and perform whatever decree may be rendered by said United States Circuit Court of Appeals for the Ninth Circuit, in the cause, or on the mandate of said United States Circuit Court of Appeals for the Ninth Circuit by the court below, then this

obligation to be void, otherwise to be and remain in full force and effect.

THE YANG-TSZE INSURANCE ASSOCIATION, Ltd.,
By E. H. Hutchison, Its Manager, (L.S.)

EQUITABLE SURETY COMPANY,
By Walter E. Morris, Its Attorney in Fact. (Seal)

The foregoing bond approved this 15th day of Jan., 1914. JEREMIAH NETERER, Judge.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 31, 1913. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3849

CANTON INSURANCE OFFICE LIMITED, a corporation,
THE YANG-TSZE INSURANCE ASSOCIATION, a corporation, Appellants,

vs.

INDEPENDENT TRANSPORTATION COMPANY, a corporation,
THE CHINA TRADERS INSURANCE COMPANY, a corporation, Appellees.

CITATION.

The President of the United States of America:

To the Independent Transportation Company, a corporation, the above named Libellant, in Causes Nos. 3848, 3849 and 3858, consolidated under No. 3849, and to Ira A. Campbell, Esquire, and Messrs. Kerr & McCord, Its Proctors; and

To China Traders Insurance Company, a corporation, the above named Respondent in Cause No. 3858, consolidated with said Causes Nos. 3848 and 3849, under No. 3849, and to William H. Gorham, Its Proctor:

You and each of you are hereby cited and admonished to appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, within thirty (30) days from the date hereof pursuant to an appeal filed in the office of the Clerk of the United States District Court for the Western District

of Washington, Northern Division, whereof the Yang-Tsze Insurance Association, a corporation, and the Canton Insurance Office, Limited, a corporation, respondents above named, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against appellants, as in said appeal, should not be corrected and why speedy justice should not be done for the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America this 30th day of December, 1913.

JEREMIAH NETERER,
Judge of the United States District Court for the Western District of Washington, Northern Division.

United States of America, Western District of Washington. —ss.

Due service of within Citation at Seattle, Washington this 30 th day of December, 1913, hereby admitted.

IRA A. CAMPBELL,
KERR & McCORD,
Proctors for Independent Transportation Company, Libellant and Appellee.

WILLIAM H. GORHAM,
Proctor for China Traders Insurance Company, a corporation, respondent in said cause No. 3858 consolidated with Nos. 3848 and 3849 under No. 3849.

RETURN ON SERVICE OF WRIT.

United States of America, Western District of Washington.

I hereby certify and return that I served the annexed citation on the therein named William H. Gorham, proctor, by handing to and leaving a true and correct copy thereof with William H. Gorham, at Seattle, in said District on the 30th day of December, A. D. 1913.

JOSEPH R. H. JACOBY,
U. S. Marshal

By L. A. MILLER, Deputy.

Marshal's fees $2.00.

RETURN SERVICE OF WRIT.

United States of America, Western District of Washington.

I hereby certify and return that I served the annexed citation on the therein named Kerr & McCord, proctors, by handing to and leaving a true and correct copy thereof with James A. Kerr, a member of said firm of Kerr & McCord, at Seattle, in said District on the 31st day of December, A. D. 1913.

JOSEPH R. H. JACOBY,
U. S. Marshal

By H. V. R. ANDERSON, Deputy.

Marshal's fees $2.12.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 30, 1913. FRANK L. CROSBY, Clerk, by Ed. M. Lakin, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

In Admiralty.

No. 3848

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

THE YANG-TSZE INSURANCE ASSOCIATION, LIMITED, a corporation, Respondent.

No. 3849

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant,

vs.

CANTON INSURANCE OFFICE, LIMITED, Respondent.

No. 3858

INDEPENDENT TRANSPORTATION COMPANY, a corporation, Libellant.

vs.

CHINA TRADERS INSURANCE COMPANY, Respondent.

Consolidated under Cause No. 3849.

ASSIGNMENTS OF ERROR.

The above named respondents Yang Tsze Insurance Association and Canton Insurance Offiffce, Limited, assign for error in the findings, conclusions and decree of the District Court in the above entitled causes Nos. 3848 and 3849, consolidated with Cause No. 3858 under No. 3849, that the learned Judge thereof erred.

First: In finding that, on January 11, 1908, when the vessel "Vashon" referred to in the 3rd amended libels in said causes was floated and moored. it was found in such condition that it was impossible for the surveyors to determine the extent of the injuries;

Second: In finding that from the time the vessel was sunk, reasonable diligence was exercised by the owner to float the vessel and to ascertain the extent of the damage;

Third: In finding that reasonable care was exercised in arranging for the raising of the vessel;

Fourth: In finding that there was nothing which showed that libellant was negligent (in raising the vessel);

Fifth: In finding that the form of policy in issue referred to as the "San Francisco Hull Time Policy" covers a vessel when laid up;

Sixth: In finding that the place where the boat was moored or laid up was at the mouth of the Duwamish River;

Seventh: In finding that the place where the boat was moored or laid up was within the limits prescribed by the policy;

Eighth: In finding that this (place where the vessel was moored or laid up) was a customary and usual place where vessels were laid up;

Ninth: In finding that this (place where the vessel was moored or laid up) was considered safe in shipping circles;

Tenth: In finding that this (place where the vessel was moored or laid up) was on Elliott Bay;

Eleventh: In concluding that the contention that no liability could attach because of a breach of warranty in the policy, in that the vessel was laid up and not employed

in the general passenger and freighting business on Puget Sound was not well founded;

Twelfth: In concluding that the libellant was entitled to recover the amount of the policies or any part thereof;

Thirteenth: In directing that a decree be entered in favor of libellant in the amount of the policies;

Fourteenth: In entering the final decree of December 15, 1913, in favor of libellant, and

(a) against respondent Yang Tsze Insurance Association in the sum of forty-nine hundred and fifty-two and 80/100 (4952.80) dollars and in addition thereto three-ninths of the costs therein taxed at $186.36;

(b) against respondent Canton Insurance Office, Limited, in the sum of sixty-six hundred and three and 73/100 ($6603.73) dollars and in addition thereto four-ninths of the costs therein taxed at $186.36;

(c) and ordering, adjudging and decreeing that unless said decree be satisfied or proceedings thereon be stayed on appeal within the time limited and prescribed by the rules and practice of this court, libellant have execution against said respondents Yang Tsze Insurance Association and Canton Insurance Office, Limited, for the sums and costs aforesaid;

Fifteenth: In not sustaining the exceptions of respondents, Yang Tsze Insurance Association and Canton Insurance Office, Limited, to the Libellant's 3rd Amended Libels, respectively;

Sixteenth: In not entering a decree in favor of said respondents Yang Tsze Insurance Association and Canton Insurance Office, Limited, and against libellant, dismissing libellant's 3rd Amended Libels against them and for costs against libellant

YANG TSZE INSURANCE ASSOCIATION,
CANTON INSUANCE OFFICE, LIMITED,

Respondents in said Causes Nos. 3848 and 3849 consolidated with Cause No. 3858 under No. 3849.

WILLIAM H. GORHAM,

Proctor for Respondents, Yang Tsze Insurance Association and Canton Insuranme Office, Limited.

United States of America, Western District of Washington
ss.

Due service of the within assignments of error hereby admitted this 12th day of January, 1914, at Seattle, Washington.

IRA A. CAMPBELL,
KERR & McCORD,
Proctors for Independent Transportation Company, Libellant.

CHINA TRADERS INSURANCE COMPANY,
By William H. Gorham, its proctor.

Endorsed: Assignments of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 12, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3849

CANTON INSURANCE OFFICE LIMITED, a corporation,
THE YANG-TSZE INSURANCE ASSOCIATION, a corporation, Appellants.

vs.

INDEPENDENT TRANSPORTATION COMPANY, a corporation,
THE CHINA TRADERS INSURANCE COMPANY, a corporation, Appellees.

Notice.

To INDEPENDENT TRANSPORTATION COMPANY, a corporation, and to CHINA TRADERS INSURANCE COMPANY, and to IRA CAMPBELL, ESQUIRE, and MESSRS. KERR & McCORD, Proctors for said Independent Transportation Company, and to WILLIAM H. GORHAM, ESQUIRE, Proctor for China Traders Insurance Company:

You and each of you are hereby notified that the Canton Insurance Office, Limited, one of the above named appellants, has this day filed a bond in the sum of seventy-seven hundred and fifty ($7750.00) dollars, staying execution of the decree in the above entitled cause in the court below, conditioned as required by law, and that the name and address of the surety on said bond is:

Equitable Surety Company of St. Louis, Missouri, a corporation, Walter E. Morris, its attorney in fact, c/o Frank Waterhouse & Co., Inc., Central Bldg., Seattle, Washington.

You and each of you are hereby notified that the Yang Tsze Insurance Association, one of the above named appellants, has this day filed a bond in the sum of six thousand and two hundred and fifty ($6250.00) dollars staying execution of the decree in the above entitled cause in the court below, conditions as required by law, and that the name and address of the surety on said bond is:

Equitable Surety Company of St. Louis, Missouri, a corporation, Walter E. Morris, its attorney in fact, c/o Frank Waterhouse & Co., Inc., Central Bldg., Seattle, Washington.

Dated at Seattle, Washington, December 31, 1913.

WILLIAM H. GORHAM,
Proctor for Appellants.

Copy of within notice received this 31st day of December, 1913. Ira Campbell and Kerr & McCord, Proctors for Independent Transportation Company, Appellees; William H. Gorham, Proctor for China Traders Insurance Co., Appellee.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 12, 1914. Frank L. Crosby, Clerk, by E. M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division. In Admiralty.

No. 3849

INDEPENDENT TRANSPORTATION COMPANY,

vs.

CANTON INSURANCE OFFICE, LTD., ET AL,

Stipulation.

It is hereby stipulated by the parties hereto that upon appeal from the decree of this Court on the merits in the above entitled cause by the respondents or any of them, at the option of respondents, there may be omitted from the record on appeal:

(1) The depositions of S. W. Eccles and Myron K. Rodgers;

(2) Exhibit 10, being a copy of Complaint of Independent Transportation Company, v. Katalla Company, Superior Court, filed herein on or about March 30, 1910;

(3) Libellant's Interrogatories attached to its answers;

(4) Libellant's answers to Interrogatories attached to respondent's answers;

(5) Exhibits 3 to 24, inclusive, all relating to matters exclusively between the libellant and Katalla Company;

(6) Exhibit 28, stipulation of parties in this cause of date April 20, 1912, in re evidence.

(7) Exhibit 29, stipulation of parties in this cause of date October 1, 1912, in re evidence;

(8) Testimony of C. A. McMasters and M. M. Perl, witnesses for Respondents as reported by Commissioner herein at pages 141-188 of Commissioner's Report;

Provided: That in the event of such omission libellant's ownership and insurable interest in the steamer "Vashon" referred to in the libels at all times in the libels mentioned shall, for all purposes of such appeal, be considered as admitted by respondents.

Dated Seattle, Washington, Dec. 26th, 1913.

(Signed) IRA A. CAMPBELL,

(Signed) KERR & McCORD,
Proctors for Libellant.

(Signed) WILLIAM H. GORHAM,
Proctor for Respondents.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 12, 1914. Frank L. Crosby, Clerk, By Ed. M. Lakin, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

CANTON INSURANCE OFFICE, LIMITED, a corporation, ET AL, Appellants,

vs.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, ET AL, Appellees.

Order Enlarging Time for Filing Record.

Good cause being shown, it is by the undersigned, the judge who signed the citation on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, ordered that the time of the appellants, Canton Insurance Office, Limited, and the Yang Tsze Insurance Association, Limited, for filing the record and docketing the cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be and the same hereby is extended and enlarged until and including the 28th day of February, 1914.

Dated Seattle, Washington, this 23rd day of January, 1914.

JEREMIAH NETERER,
United States District Judge for the Western District of Washington.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 23, 1914. Frank L. Crosby, Clerk, By....., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 3849.

INDEPENDENT TRANSPORTATION COMPANY, Libellant,

vs.

CANTON INSURANCE OFFICE, LIMITED, ET AL, Respondent.

Praecipe for Apostles.

To the Clerk of the Above Entitled Court:

Herewith I hand you 50 printed copies of the Apostles on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, consisting of the following:

(1) A caption exhibiting the proper style of the court and the titles of the causes;

(2) Index;

(3 Names and Addresses of Counsel;

(4) Stipulation with reference to Printed Record and sending up Original Exhibits as Supplemental Record;

(5) Order for sending up original exhibits as Supplemental Record;

(6) Order enlarging time for filing Record;

(7) Statement required by Rules of United States Circuit Court of Appeals for Ninth Circuit;

(8) Stipulation to Consolidate causes;

(9) Order consolidating causes;

(10) Third amended libel in cause No. 3848;

(12) Stipulation as to exhibits referred to in exceptions in Cause No. 3848;

(14) Answer to third amended libel in Cause No. 3848;

(15) Third amended libel in Cause No. 3849;

(17) Stipulation as to exhibits referred to in exception in Cause No. 3849;

(19) Answer to Third Amended Libel in Cause No 3849;

(20) Memorandum Decision on Exceptions;

(21) All of the testimony and other proofs except such as by stipulation between the parties of date December 26, 1913, it is provided may be omitted from the record on appeal;

(22) All memorandum decisions of the Court;

(23) Final Decree;

(24) Summons and Severance;

(25) Order fixing amount of supersedeas;

(26) Notice of Appeal;

(27) Appeal Bonds;

(28) Notice of filing Appeal Bonds;

(29) Citation;

(30) Assignments of Error;

(31) Stipulation as to omitting part of Record;

(32) This praecipe;

one of which copies you will please certify and all of which you will please forward to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, for filing therein.

Dated Seattle, Washington, January 31st, 1914.

WILLIAM H. GORHAM,

Proctor for Appellants, Yang Tsze Insurance Association, Limited, Canton Insurance Office, Limited.

(Endorsed): Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 3, 1914. Frank L. Crosby, Clerk, By Ed. M. Lakin, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 3849.

INDEPENDENT TRANSPORTATION COMPANY, Libellant,

vs.

CANTON INSURANCE OFFICE, LIMITED, ET AL, Respondents.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America, Western District of Washington, ss.

I, FRANK L. CROSBY, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing three hundred and sixty

pages, numbered from 1 to 230 inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled consolidated causes Nos. 3848 and 3849, as is called for by praecipe of proctor for appellants, as the same remain of record and on file in the office of the Clerk of said District Court and that the same, together with the original exhibits (except as are otherwise stipulated by the parties hereto) separately certified, constitute the apostles on appeal from the order, judgment and decree of the District Court of the United States for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

I further certify that I transmit herewith the original citation on appeal issued in said causes.

I further certify that the cost of preparing and printing the foregoing apostles on appeal is the sum of $216.00, which has been paid by the proctor for respondents and appellants, Canton Insurance Office, Limited, and Yang Tsze Insurance Association, Limited, and that the further sum of $203.70 has been paid me by proctor for said respondents and appellants for certifying said apostles.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 20th day of February, 1914.
(L. S.)

FRANK L. CROSBY,

Clerk.

2

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CANTON INSURANCE OFFICE, LIMITED, a corporation, THE YANG-TSZE INSURANCE ASSOCIATION, a corporation,
Appellants,

vs.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, THE CHINA TRADERS INSURANCE COMPANY, a corporation,
Appellees.

No. 2333

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR APPELLANTS

WILLIAM H. GORHAM,
Proctor for Appellants.

653 Colman Building,
Seattle, Washington.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CANTON INSURANCE OFFICE, LIMITED, a corporation, THE YANG-TSZE INSURANCE ASSOCIATION, a corporation,
Appellants,

vs.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, THE CHINA TRADERS INSURANCE COMPANY, a corporation,
Appellees.

No. 2332

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR APPELLANTS

STATEMENT OF CASE.

The appellants, together with appellee China Traders Insurance Company, were respondents below; against each of whom appellee Independent Transportation Company recovered severally. The China Traders Insurance Company declined to join

in this appeal upon summons and severance duly served upon it by appellants, and was therefore named as appellee in the subsequent notice of appeal, citation, etc., in the proceedings for securing a review by this court. As the appellee China Traders Insurance Company has not appeared herein or otherwise appealed from the decree recovered against it, and is thus only a nominal party to this review, wherever the word "appellee" is used herein, it will be understood to refer to the libellant below, the Independent Transportation Company, unless otherwise expressly stated.

I.

The question of appellee's ownership of the VASHON is not raised here. In July, 1907, the appellants issued to appellee their several policies (Exhibits "G" and "H") Hull Time, San Francisco form, on the steamer VASHON then sixteen years old and recently acquired and owned by appellee.

Each policy in addition to bearing an endorsement on its face as follows:

(a) "Warranted employed in the general freighting and passenger business on Puget Sound within a radius of 30 miles from Seattle."

contained the following clauses in the body thereof, to-wit:

(b) "3d. Touching the adventures and perils which this Insurance Company is contented to bear and takes upon itself in this policy they are of the seas, * * * and all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which Insurers are liable by the Rules and Customs of Insurance in San Francisco including the rules for Adjustment of Losses *printed on the back hereof,* and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this policy."

(c) "8th. It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by perils insured against (except on anchors, copper and calking under the copper) as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage and their proceeds deducted from the gross loss.

and further contained Rules for Adjustment of Marine Losses printed on the back thereof, *inter alia,* the following, to-wit:

(d) "*Rule VI. Surveys.* The insurers shall not be obliged to accept any adjustment on a vessel based upon a survey which omits to discriminate between the repairs attributable only to the perils insured against, and such repairs as are due only to wear and tear or to the original defects, natural decay, or depreciation of the vessel.

(e) "*Rule VII. Bills for Repairs.* When bills for repairs are presented, which include items indifferently specified, chargeable partly to owners and partly to underwriters, and having no reference to discrimination in the survey, the adjuster shall require the claimant or master to separate the charges in accordance with the survey. Failing wherein, the adjuster shall refer the bill back to the maker thereof, with a request to separate the items, so as to correspond with the survey. Failing in both, it shall be the custom to charge the whole of the unspecified items to the "owners" column.

(f) "*Rule IX. Appointment of Surveyors and Appraisers.* In all cases of average, whether General or Particular, whether on Hull or Cargo, the selection and appointment of Surveyors and Appraisers shall be agreed upon beforehand by and between the insured or claimants in average, or their representatives on the one side, and the representatives of the insurers on the other; and the services of the persons so appointed shall be understood to be wholly disinterested as between all parties concerned. No representatives of Underwriters shall be expected to certify, approve, or accept any surveys or appraisements made in contravention of this rule; but such documents shall be deemed to be wholly *ex parte* in character, and, as such, open to criticism, or liable to be rejected altogether. In no case shall any ship-carpenter, rigger, or other mechanic who may have served on a survey, be employed to make the repairs or any portion thereof."

II.

The vessel, at the time of placing the insurance, was running from Seattle across Seattle Harbor to Alki Point, carrying mostly passengers; she continued in that business after the insurance was taken out, until some time in the following August, when she was laid up and moored at the King Street dock, Seattle Harbor, and there she remained until the 3d of December following, when she was taken directly from her berth at King Street dock into and up the Duwamish River emptying into Seattle Harbor and there moored, laid up for the winter, out of commission, her master and crew discharged, and her care and custody entrusted to a river boatman living on the bank of the river adjacent to where the vessel was moored.

On December 15th following, the vessel filled with water and sank at her moorings. At the request of appellee, Captain Gibbs and Mr. Frank Walker at once took charge of salvage operations; the vessel was floated January 11, 1908, hauled out and cleaned February 12, 1908; on April 15, 1908, the survey of the vessel was completed, and an attempt made by appellee to abandon the vessel to appellants by service of an alleged notice of abandonment; abandonment was declined by appellants

on April 17, 1908; subsequently, on April 20, 1908, proofs of loss were submitted by appellee to appellants; on April 25, 1908, appellants denied all liability; subsequently bids were called for and submitted based on specifications contained in the surveyors' report (Exhibit "C") for the repair of the vessel, the lowest of which was for $14,027; but the vessel, instead of being repaired was sold for $750; and appellants having denied all liability, this litigation was commenced by the filing of libels *in personam*.

THE PLEADINGS.

The third amended libels allege the issuance of the policies of insurance by appellants for the term from July, 1907, to July, 1908; the sinking of the vessel on December 15, 1908 (? 1907), while properly and securely moored; the consequent damage; salvage operations and floating of vessel January 11, 1908; hauling out on February 12, 1908; and diligent effort to ascertain extent of damage and estimated cost of repairs completed on April 15, 1908; proofs of loss; denial by appellants of all liability; sale at $750; depreciation by reason of damage by sinking; salvage expenses incurred in laboring to save vessel; appellants' proportion of damage and salvage expenses.

The answers admit the issuance of the policies of insurance, the sinking of the vessel, floating her, hauling her out, denial by appellants of all liability; deny diligent effort on part of appellee to ascertain extent of damage and estimated cost of repairs; deny any liability for damage sustained by sinking or salvage charges in laboring to save vessel.

And the answers allege affirmatively:

That, by the policies in question, appellee expressly warranted to appellants that during the term of the policies the vessel would be and remain employed in the general freighting and passenger business on Puget Sound within a radius of thirty miles from Seattle; that on December 3, 1907, in violation of said express warranties, the vessel was removed by appellee from Puget Sound and towed to a point in the Duwamish River, there moored to piling, laid up for the winter, out of commission, her master and crew discharged, her care and safety entrusted to a river boatman living on the river bank, and that on December 15, 1907, the vessel, while so moored, laid up, out of commission, her master and crew discharged, and her care and safety entrusted as aforesaid, filled with water and sank; that appellants have no knowledge or information as to extent of damages sustained by vessel by reason of her so sinking; and demanded proof of same, if material.

By stipulation, Article V of the 3d Amended Libels were considered as amended so as to allege: That the vessel was securely moored within the tidal waters within and near the mouth of the Duwamish River without notice to appellant of laying up, and without demand for or receipt of return premium; and while so laid up, by well-known custom, vessel was deemed to be and was in fact covered by the policies in question; and that while so properly moored on December 15, 1909 (? 1907), said vessel sunk and by reason thereof became damaged, and appellee suffered a loss and incurred expenses for labor to save the vessel.

On the issues as joined by the pleadings, testimony was taken before the Commissioner, to whom the case had been referred, and by deposition *de bene esse;* and, upon the pleadings and testimony taken, the cause was submitted to the court below and determined by it in favor of appellee; whereupon final decree was entered in the sum of nineteen-twentieths of the amount of the policies (plus interest and salvage) on the basis that appellee's loss was the difference between $15,000, the valuation, and $750, the proceeds of sale, i. e., nineteen-twentieths of the valuation; from which decree this appeal is taken.

SPECIFICATION OF ERRORS.

Asserted and Intended to be Relied Upon.

The above-named respondents, Yang-Tsze Insurance Association and Canton Insurance Office, Limited, assign for error in the findings, conclusions and decree of the District Court in the above-entitled causes Nos. 3848 and 3849, consolidated with cause No. 3858 under No. 3849, that the learned Judge thereof erred:

First: * * *

Second: In finding that from the time the vessel was sunk, reasonable diligence was exercised by the owner to float the vessel and to ascertain the extent of the damage;

Third: In finding that reasonable care was exercised in arranging for the raising of the vessel;

Fourth: In finding that there was nothing which showed the libellant was negligent (in raising the vessel);

Fifth: In finding that the form of policy in issue referred to as the "San Francisco Hull Time Policy" covers a vessel when laid up;

Sixth: In finding that the place where the boat was moored or laid up was at the mouth of the Duwamish River;

Seventh: In finding that the place where the boat was moored or laid up was within the limits prescribed by the policy;

Eighth: In finding that this (place where the vessel was moored or laid up) was a customary and usual place where vessels were laid up;

Ninth: In finding that this (place where the vessel was moored or laid up) was considered safe in shipping circles;

Tenth: In finding that this (place where the vessel was moored or laid up) was on Elliott Bay;

Eleventh: In concluding that the contention that no liability could attach because of a breach of warranty in the policy, in that the vessel was laid up and not employed in the general passenger and freighting business on Puget Sound was not well founded;

Twelfth: In concluding that the libellant was entitled to recover the amount of the policies or any part thereof;

Thirteenth: In directing that a decree be entered in favor of libellant in the amount of the policies;

Fourteenth: In entering the final decree of December 15, 1913, in favor of libellant and

(a) against respondent Yang-Tsze Insurance Association in the sum of forty-nine hundred and fifty-two and 80/100 ($4,952.80) dollars and in addition thereto three-ninths of the costs therein taxed at $186.36;

(b) against respondent Canton Insurance Office, Limited, in the sum of sixty-six hundred and three and 73/100 ($6,603.73) dollars and in addition thereto four-ninths of the costs therein taxed at $186.36;

(c) and ordering, adjudging and decreeing that unless said decree be satisfied or proceedings thereon be stayed on appeal within the time limited and prescribed by the rules and practice of this court, libellant have execution against said respondents Yang-Tsze Insurance Association and Canton Insurance Office, Limited, for the sums and costs aforesaid;

Fifteenth: * * *

Sixteenth: In not entering a decree in favor of said respondents Yang-Tsze Insurance Association and Canton Insurance Office, Limited, and against

libellant, dismissing libellant's 3d Amended Libels against them and for costs against libellant.

ARGUMENT.

There are five points that appellants raise on this appeal.

First: That, if laying up for winter were permissible under the policies, the contract of insurance, so far as it covered the vessel during laying-up period, was not maritime in its character and admiralty has no jurisdiction.

Second: That the express warranty was a continuing warranty during the term of the policies.

Third: That the loss and damage complained of occurred during breach of the warranty while the vessel was in waters other than those prescribed by that warranty.

Fourth: Abandonment Waived. The appellee failed to exercise diligence to float the vessel and to ascertain the extent of the damage, thereby waiving its right to abandon.

Fifth: Partial Loss. That the proofs fail to disclose the amount of the loss and damage, sustained by appellee by reason of the sinking of the vessel, recoverable under the policies.

FIRST.

If laying up for winter were permissible under policies, the contract of insurance, so far as it covered the vessel during laying up period, was not maritime in character and admiralty has no jurisdiction.

The affidavit of Warner attached to and a part of the proofs of loss introduced by appellee and received in evidence (Exhibit "E") is to the effect that "he was appointed by the proper parties to move the Steamer VASHON from King Street wharf, Seattle, up the Duwamish River where she was to be *laid up for the winter* * * *; that the deponent then entered into an agreement with Mr. Faber to take care of and guard the VASHON. Faber is the owner of the boathouse located about one hundred yards to the stern of the steamer and has two men in his employ, one of which is constantly on duty".

Hamilton, the vice-president of appellee (Record p. 30), witness for appellee, testified that the vessel was moored in the Duwamish River by Captain Warner acting as captain for appellee (Record p. 79).

The third amended libels as amended by stipulation, allege the laying-up of the vessel (Record p. 26).

When the vessel was so moored, she was laid up for the winter, out of commission, her master and crew discharged, and her care and safety entrusted to that river boatman. She then ceased to be an agency of commerce, was withdrawn from navigation and without maritime obligation. The policies in suit, so far as they covered the vessel during this laying-up period, were consequently not of a maritime character.

It was said by this court in *Pacific Coast Steamship Company vs. Ferguson,* 76 Fed. 993, that while the test in American courts of the admiralty jurisdiction is whether or not the contract has reference to maritime services or maritime transaction, its scope has not been extended but remains as defined in *Insurance vs. Durham,* 11 Wall. 1, where the court said that the jurisdiction depended, not on the place where the contract was made, but on the subject-matter of the contract; if that was maritime, the contract was maritime; and that might be regarded as the established doctrine of that court.

"The test is, the actual *status* of the structure, as being fairly engaged in commerce or navigation. A contract, claim or service to be cognizable in the admiralty, must be maritime in such a sense that it concerns rights or duties appertaining to commerce or navigation. 1 *Conk. Adm.* 8, *The Belfast,* 7 Wall. 624."

The Hendrick Hudson, Fed. Cas. No. 6355.

"The true criterion by which to determine whether any water craft or vessel is subject to admiralty jurisdiction, is the business or employment for which it is intended or is susceptible of being used, or in which it is actually engaged rather than its size."

The General Cass, Fed. Cas. No. 5307.

"In actions on contract the agreement sued upon must be maritime in its character. It must pertain in some way to the navigation of the vessel, having carrying capacity and employed as an instrument of travel, trade or commerce, although its form, size and means of propulsions are immaterial."

Raft of Cypress Logs, Fed Cas. No. 11527;

Pile Driver E. O. A., 69 Fed. 1005.

In the case of *The Sirius,* 65 Fed. 226, opinion by Morrow, Judge, the services of a watchman rendered while the vessel lay at her home port, out of commission, with no voyage in contemplation, were held to be non-maritime in character. To the same effect, *The James T. Furber,* 157 Fed. 124.

In the case of *The C. Vanderbilt,* 86 Fed. 785, wharfage furnished a vessel while withdrawn from navigation was held to be non-maritime in character and a lien therefor denied; to the same effect *The Murphy Tugs,* 28 Fed. 429.

In the case of *The Richard Winslow,* 71 Fed. 426, C. C. A. 7th Circuit, where there was a contract to transport grain from Chicago to Buffalo, the grain to remain in the vessel in storage for the winter upon its arrival at Buffalo, the contract for storage was held not maritime.

In the case of *The Winnebago,* 141 Fed. 945, C. C. A. 6th Circuit, it was held that a vessel ceases to possess a maritime character when she is permanently withdrawn from her use as an agency of commerce.

In the case of *The City of Detroit vs. Grummond,* 121 Fed. 963, C. C. A., 6th Circuit, a contract for insurance against fire on a vessel lying moored and in use as a hospital was held non-maritime in character for the reason that it did not relate to navigation but only to a vessel which was to lie moored in the Detroit River as a hospital.

In the case of *The Hydraulic Steam Dredge No. 1,* 80 Fed. 545, C. C. A. 7th Circuit, it was held

that even upon the assumption that the structure under consideration (a dredge) was a ship or vessel and within the admiralty jurisdiction, that jurisdiction will not be asserted to enforce a contract touching the ship unless such contract is maritime in its nature; that not every contract having reference to a ship is within the admiralty jurisdiction, but only such contracts as pertain to the navigation of a ship or assists the vessel in the discharge of a maritime obligation. It is not enough that the service is to be done on the sea or with respect to the ship, it must relate to trade and commerce upon the navigable waters.

In the case of *The George W. Elder,* 206 Fed. 268, where a vessel while engaged in commerce was wrecked and sunk, abandoned to the underwriters and raised after operations lasting one year and a half, during which time her enrollment was surrendered, and after raising was towed to a dry dock, repaired and thereupon resumed her business in coast-wise trade, it was contended, in resisting a lien for repair in the dry dock that the ship at the time of being repaired was not engaged in commerce and navigation, but this court held:

> "True, while lying in the dry dock, she was idle, but she was being made ready to resume her voyages. Her position was wholly *differ-*

> *ent* from that of a vessel purposely *withdrawn from navigation or laid up* because her field of operation is for some reason closed."

In the case of *The Jefferson,* 158 Fed. 358, admiralty jurisdiction was denied in a suit to recover for salvage services rendered in aiding to extinguish a fire on the vessel while in dry dock; and, while this was reversed in the Supreme Court, *Simmons vs. S. S. Jefferson,* 215 U. S. 130, the latter court found:

> "That the steamship before being docked had been engaged in navigation, was dedicated to the purpose of transportation and commerce and had been placed in the dry dock to undergo repairs to fit her to *continue in such navigation* and commerce";

and held:

> "In reason, we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, *for the purpose of making necessary repairs to fit her for continuance in navigation,* she is placed in a dry dock."

The ground of the decision is the purpose to continue the vessel in commerce and navigation in which she was engaged before being drydocked.

In the case at bar the vessel had been in commerce and navigation but, at the time of the loss

complained of, had been and was purposely withdrawn from navigation and commerce, laid up because her field of operation was for some reason closed, a wholly different position, as this court said in *The George W. Elder, supra.*

It is not enough to say that the policies of insurance cover the vessel against marine risks during the laying-up period, and that therefore they are maritime in character. The VASHON having been withdrawn from navigation and use as an agency of commerce, it ceased to be a subject of maritime contract.

The watchman on a vessel laid up and withdrawn from navigation has a direct relation to that property and to its perils—stands between that property and those perils to minimize the loss arising from the latter either to the owner (if the property is uninsured) or to the underwriters (if the property is insured) against those perils.

Where there is no insurance, the watchman stands between the owner and the perils; where there is insurance, the underwriter stands between the owner and the perils, while the watchman stands between the underwriter and the perils; in either case the watchman and the perils are juxtaposed.

If such a vessel is not a subject of maritime contract for services of a watchman to safeguard that property against perils incident to laying-up, *a fortiori,* such a vessel is not a subject of maritime contract for the insurance of the vessel against those perils.

Nor could it be successfully contended that, as the policies when they attached were maritime in character, therefore they continued as such when the vessel was withdrawn from navigation.

In *Pacific Coast Steamship Co. vs. Ferguson, supra,* where the contract was held partly maritime and partly non-maritime, this court decided that the admiralty court had no jurisdiction of a suit to enforce the non-maritime part of such contract. To like effect, *Grant vs. Poillon,* 20 How. 162.

Assuming laying-up were permissible under the policies and the vessel were covered while laid-up in the Duwamish River, appellee's remedy for the loss under the policies was at law and not in admiralty.

Failure to assign as error the question of jurisdiction, does not preclude appellants from raising it at this stage of the proceedings.

Simpkins Federal Suit at Law, 186.

This court, on its own motion, will reverse a decree of the lower court for want of jurisdiction as to the subject-matter.

> *Puget Sound Navigation Co. vs. Lavendar et al,* 156 Fed. 361.

For these reasons we submit that the learned court below erred in its memo-decision in concluding that libellant was entitled to recover and directing and entering a decree for libellant, and not entering decree dismissing the 3d Amended Libels, (12th, 13th, 14th and 16th Assignments of Error).

SECOND.

That the express warranty was a continuing warranty during the term of the policies.

I.

The express warranty of the policies reads:

> "Warranted employed in the general freighting and passenger business on Puget Sound, within a radius of thirty miles from Seattle."

The construction to be given the word "employed" was, during the progress of the cause in the court below, argued at length by the respective parties before Judge Hanford, the appellants contending that the warranty was a continuing one

during the term of the policies; and that learned judge in a memo-decision filed in the cause (Record pp. 24-26) held:

> "The word 'employed' is a verb of the past or present tense and cannot be accurately used potentially to indicate future action unless qualified by additional words not found in these warranty clauses. The argument of respondents assumes that the warranties relate to future employment of the vessel during the life of the policies and that the clauses should be interpreted to read—vessel warranted to be employed in the general passenger and freighting business on Puget Sound. The interpolation of the words 'to be' would materially change the meaning of the clause, and it is not permissible to thus interpolate in order to change the meaning of a contract which courts are required to enforce strictly according to the terms assented to by the parties."

On the final hearing below, the matter was further argued, the appellants contending as before, before Judge Neterer, who in a memo-decision filed in the cause (Record p. 201, at p. 206), said:

> "The contention that no liability could attach because of a breach of warranty in the policy, in that the vessel was laid-up and not employed in the general passenger and freighting business on Puget Sound was presented to Judge Hanford, and the reason then given express my views as to the use of the word 'employed' when used in connection with the evidence in the case."

The word "employ" is a verb transitive, meaning:

(2) "To use, to have in service, to cause to be engaged in doing something; (c) to have or *keep at work.*

Webster's International Dictionary, 1902.

(2) "To give occupation to; make use of the time, attention or labor of; *keep busy or at work.* (4) Syn. 2. Employ, Hire * * * employ expresses continuous occupation more often than hire does.

Century Dictionary.

(1) "* * * set or *keep at work.*

Standard Dict. Funk & W., 1895.

All the authorities define "to employ" as: "to keep at work".

Keep is a verb transitive meaning:

(1) "to remain in any position or state; to continue."

The sense is essentially a continuing one, continuity is one of its elements.

So to say in an insurance policy: "vessel warranted in a certain business" means warranted in that business at the time the policy attaches; but to say "vessel warranted employed in a certain business" is equivalent to saying "vessel warranted kept at work in a certain business".

"Employed" or kept at work implies, not a momentary or a completed state but a continuing state or condition.

> "The word 'employed' is more commonly used as signifying *continuous* occupation."
>
> *Wilson vs. Gray,* 127 Mass. 98, 99.

> "To be employed in anything means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it."
>
> *U. S. vs. Catherine,* 25 Fed. Cas. 332, 338;
>
> *U. S. vs. Morris,* 39 U. S. 464 at 475.

Further, the verb "employ" is a verb transitive requiring an object to complete its sense and donating action terminating on some object; and may be used in the active or passive voice. If used in the active voice, the imperfect or past participle "employed" must be followed by the object upon which the subject acts. The vessel does not employ anything—it is the owner that employs the vessel.

But the word "employed" in the warranty under consideration is not used in the active voice, the vessel is not employing anything, past, present or future. It is the owner who is employing the vessel. The vessel is *being* employed in certain trade and waters—that is the passive voice of the

verb "employ" and represents the subject as receiving an action.

The passive voice is formed by writing with the past participle of any transitive verb some form of the auxiliary verb "to be" and in no other way.

So we say: vessel warranted (1) being employed, (2) to be employed, (3) was employed, (4) is employed, (5) shall or will be employed. We can use the past participle "employed" in the passive voice only by supplying some form of the auxiliary verb "to be"—the infinitive "to be", the gerund "being", the present "is" or the present perfect "has been", the imperfect "was" or the past perfect "had been", the future "will be" or future perfect "will have been". And whenever we use the transitive verb "employ" in the passive voice without some form of the verb "to be" then some form of that auxiliary is *understood or implied.*

> "Satan exalted sat, by merit *raised* to that bad eminence."
>
> *Paradise Lost,* Book II, line 1.

> "The wretch * * * shall go down
> * * *
> *Unwept, unhonour'd* and *unsung.*"
>
> *Lay of Last Minstrel,* Canto VI, Stanza 1.

So much of the memo-decision of the court (Record pp. 24-26) as says:

> "The interpolation of the words 'to be' would materially change the meaning of the clause",

does violence to the rules of grammar governing our language since the days of Chaucer.

What form of the verb "to be" shall be supplied or implied in relation to the word "employed" as used in the warranty?—shall the contract read:

vessel warranted (is) employed

vessel warranted (was) employed

vessel warranted (will or shall be) employed, or

vessel warranted (to be) employed.

The appellants' contention was and is that employment referred to in the warranty relates to the future which would require the interpolation of the words "will be" or "shall be" or "to be" in a continuing sense, so that the warranty would read:

> "Warranted (will be or shall be or to be) employed," etc.

II.

The court below, Judge Hanford presiding, on the re-hearing of the matter after the filing of his memo-decision, stated orally from the bench that it would permit proof to be offered and received as to

whether the warranty in the policies related to the past, present or future.

This proof is contained in the record—the witnesses for appellants, Hutchison, agent for appellant Yang-Tsze (Record pp. 139-140); Frederick, agent for appellee, China Traders (Record pp. 141-142); Mason, agent of appellant Canton (Record pp. 124-126); Rosenthal, president San Francisco Board of Marine Underwriters (Record pp. 149-150); Pinkham, manager of Marine department of J. B. F. Davis & Son of San Francisco, agents Standard Marine Ins. Co. of Liverpool (Record pp. 152-153); Smith, twenty-eight years' experience general marine agent at San Francisco (Record pp. 155-156); Thompson, marine insurance brokerage business for nine years at San Francisco (Record p. 162); Barneson, shipping and commission business for twenty years (Record pp. 168-169); Alexander, forty years in marine insurance business (Record pp. 175-176); Theobald, manager for agents of appellant Canton, twenty-three years' experience in marine insurance business (Record p. 183), all testify that the express warranty under discussion, and as contained in the policies in suit, applies to the entire term of the policies; that is, the warranty is that the vessel *will be employed,* as indicated, *during the life* of the policies.

Witnesses for appellee: Taylor (Record p. 93), La Boyteaux (Record pp. 193-195), and Levison (Record pp. 195-198), were asked certain questions respecting the policies in suit, but those questions as propounded by appellee expressly in terms excluded consideration of the "endorsements" i. e., the warranties, so that there is no testimony on behalf of appellee upon the question under present consideration, as to whether the warranty expressed in the policy was a continuing one or otherwise.

Considering the number and character of appellants' witnesses and their unanimity, and appellee's silence on the question, we submit that appellants' contention that the warranty under discussion applied during the life of the policies is established.

For these reasons, we submit that the learned court below erred in concluding that the contention that no liability could attach because of breach of warranty in policy in that the vessel was laid up and not employed in general passenger and freighting business in Puget Sound was not well founded.

(11th Assignment of Error.)

THIRD.

That the loss and damage complained of occurred during a breach of the warranty, while the

vessel was in waters other than those prescribed by that warranty.

I.

The proofs of loss submitted by appellee and the record discloses, and it is not denied or contended otherwise: That for some time immediately preceding, and at the time of the loss and misfortune to the VASHON complained of in the third amended libels, the insured vessel—

(a) had been and was withdrawn from the general freighting and passenger business;

(b) had been and was withdrawn from all business or trade, general or special;

(c) had been and was out of commission, for the purpose of laying-up for the winter;

(d) had been towed from and out of Elliott Bay or Seattle Harbor, an arm of Puget Sound, and from and out of Puget Sound, into and up the Duwamish River;

(e) had been and was moored in the Duwamish River for the purpose of laying-up for the winter;

(f) had been and was laid-up in the Duwamish River for the winter,

and the appellants contend that the express warranty on the part of appellee contained in the policies was thereby breached.

There is no dispute between the appellants and appellee as to the exact locality in the Duwamish River that the vessel was moored.

The proofs of loss submitted in evidence by appellee (Exhibit "E"), contain a diagram of the place of the sinking of the vessel designated as Duwamish River; the affidavits of Warner and Faber forming a part of said proofs of loss, recite the mooring and the sinking of the vessel in the Duwamish River; on the appellee's Exhibit "J", a blueprint of township 24 north, range 4 east, W. M., the location of the vessel in the Duwamish River is, by appellee's witness Warner who moored her, indicated by the letter "M" "right below the figures '30' " (Warner's test., Record pp. 95-96). The third amended libels as amended alleged the vessel moored within the mouth of the Duwamish (Record p. 26).

Appellants' Exhibits 26 and 27, copies of the field notes of part of said township and of the plat of said township, certified by the U. S. Surveyor General for the State of Washington, were introduced and received in evidence "for the purpose of

showing the meanders of the Duwamish River at and about the place where the wreck occurred". (Record p. 144.)

Appellee's witness Warner was asked, on direct examination, and answered as follows:

> Q. Now, have you at any time observed and to what extent, if any, these lands about the place where the vessel was moored, were flooded, if at all, at high tides?
>
> A. The only time I ever noticed them flooded was when there had been a big freshet.
>
> Q. Were the lands on either side of the river diked there?
>
> A. No; they were not diked. When there was a big tide there it was just up to the bank.
>
> Q. At extreme high tide was this land flooded there around where this vessel was moored?
>
> A. No.
>
> Q. To no extent?
>
> A. Not that I saw when I was there.
>
> Q. Were you ever up there at extreme tide so that you could observe the extent, if any, to which this land might be flooded with water?
>
> A. Oh, I have seen it flooded at the time of the freshets; that is all; it is flooded all over then.
>
> Q. Have you been up in that vicinity at other times?
>
> A. Yes, sir.

Q. Well, what is the character of this land at the point and below the point, about the point where this vessel was moored, as being tide land or not?

A. I would not consider that was tide land. When it came over at the bank—well I never seen it come over the bank there. (Record pp. 100, 101.)

Captain Barneson, witness for appellants, on cross-examination, testified that he knew where the tide flats of Seattle were (Record p. 172); and, on re-direct examination, that he did not consider Duwamish River, Puget Sound (Record p. 173); and, on re-cross examination, that you are not in the (Duwamish) River when you are on the (Seattle) tideflats; that he would not consider you were in the river when you are on the flats (Record p. 174).

II.

Some testimony was introduced by appellee to the effect that it is the custom on the Pacific Coast of the United States to consider vessels to be held covered by their insurance while *laid-up*. We do not dispute that, in a proper case, the insurance remains in force while the vessel is laid-up. "Laying-up" is withdrawing a vessel from commission, when, with consent of insurers or in accordance with custom in a proper case, the vessel is put on "Har-

bor risk" at a reduced rate of premium. But "laying-up" does not in itself operate to relieve the restrictions of the policy as to prescribed waters. And where custom is inconsistent with the contract, the contract must control; a custom inconsistent with the terms of the contract cannot be incorporated into it.

U. S. vs. Buchanan, 8 How. 83;
Moran vs. Prather, 23 Wall. 492;
1 *Parsons, Marine Ins.,* 88.

III.

The Civil Code of California, which is in express terms written into the policies, provides:

> "Sec. 2608. *Warranty as to the future.* A statement in a policy which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place.
>
> "Sec. 2610. *What acts avoid the policy.* The violation of a material warranty or other material provisions of a policy on the part of either party thereto, entitles the other to rescind."

An examination of the fourth clause of the policies in suit will disclose that, under the San Francisco Hull Time form of policy, the use of certain ports and certain latitudes in the eastern and

western hemispheres and whaling, fishing, sealing or trading are prohibited, though the vessel may touch and stay at any ports or places, if thereunto obliged by stress of weather, etc.

Without endorsement prohibiting, the vessel could proceed anywhere in the navigable waters of the globe except the particular prohibited ports, places and waters, and even these under stress of weather.

The endorsement on the policies in suit, restricting the waters permitted from the navigable waters of the globe to "Puget Sound within a radius of thirty miles from Seattle," was, in the language of Sec. 2608, C. C. C., *supra,* a statement which imported that it was intended not to do a thing which materially affected the risk, that is, not to use the waters permitted in the printed body of the policies except Puget Sound, and such statement was a warranty that such use should be so restricted.

The risks appellants were insuring against were exclusively the risks incident to navigation on Puget Sound, not those incident to navigation on any other waters or incident to any other use of the vessel than its navigation.

Parsons defines an express warranty as—

"stipulations or promises of the assured, in the policy that certain things exist or shall exist, or have been or shall be done."

1 *Parsons on Marine Insurance,* 337.

"The warranty is equally binding and a breach of it equally fatal whether the thing warranted be material or immaterial."

Id. 337.

Phillips defines an express warranty as—

"an agreement expressed in the policy whereby the assured stipulates that certain facts are, or shall be, true or certain acts shall be done, in relation to the risk."

1 *Phillips Ins.* (3rd Ed.) Sec. 754.

The distinction of an express warranty from a representation is that—

"an express warranty must be 'strictly' and it is even said 'literally' complied with; whereas it is sufficient that a representation is complied with substantially."

Id. Sec. 762.

"It is held, that the intention of the parties in a warranty, except as to the meaning of the words used, is not to be inquired into; the assured has chosen to rest his claim against the insurers on a condition inserted in the contract, and whether the fact or engagement, which is the subject of the warranty, be material to the risk or not, still he must bring himself strictly within that condition. The rigid construction

put upon warranties, in this particular, has perhaps arisen, in part, from the maxim of the common law, that conditions are to be severally construed in regard to the party imposing them on himself."

" 'A warranty,' says Lord Mansfield, 'must be strictly performed, nothing tantamount will do.'

"Mr. Justice Buller: 'It is a matter of indifference whether the thing warranted be material or not, but it must be literally complied with.'

"Mr. Justice Ashhurst: 'The very meaning of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally.'

"And Lord Eldon: 'When a thing is warranted it must be exactly what it is stated to be.' "

Id. Sec. 762.

Arnould defines an express warranty as—

"a stipulation inserted in writing on the face of the policy on the literal truth or fulfilment of which the validity of the entire contract depends.

"These written stipulations either allege the existence of some fact or state of things, at the time or previous to the time of making the policy, as that the thing insured is neutral property; that the ship is of such a force; that she sailed on such a day or was all well at such a time; or they undertake for the happening of future events or the performing of future acts as, that the ship shall sail on or before a given

day; that she shall depart with convoy; that she shall be manned with such a complement of men, etc.

"In the former case, Mr. Marshal terms the stipulation an affirmative, and in the latter a promissory warranty."

2 *Arnould Mar. Ins.*, 7th Ed., Sec. 628.

An express warranty—

"requires a strict and literal fulfilment, i. e., what it avers must be *literally true,* what it promises must be exactly performed."

Id. Sec. 632.

"No cause, however sufficient; no motive, however good; no necessity, however irresistible, will excuse non-compliance with an express warranty."

Id. Sec. 635.

A representation—

"differs from an express warranty as that always makes a part of the policy and must be strictly and literally performed."

Hazzard Administrators vs. N. E. Ins. Co., 8 Peters 557 at p. 580.

In the case of *Hastorf vs. Greenwich Insurance Co.,* 132 Fed. 122, the policy provided—

"warranted by the assured to be employed exclusively in the freighting business and to navigate only the waters of the Bay and Harbor of New York, the North and East Rivers and inland waters of New Jersey."

The loss was suffered while the vessel was lying at a wharf on the south side of Rondout Creek, about two and one-half miles from the Hudson River; the court said:

> "There can be no doubt that Rondout Creek is a different body from the North or Hudson River, and that the language used does not in terms cover the locality in which this accident happened, but, to a certain extent, the creek is a continuation or tributary of the river, and testimony was permitted for the purpose of ascertaining whether the former was intended to be covered."

Further testimony as to whether the waters of the creek were considered waters of the North River was offered and tentatively received and considered by the court, which said:

> "I conclude that it *affords no aid to a construction* of the policy which is *apparently plain and unambiguous* in its terms. I do not see how its language can be extended to cover this creek."

In *Pearson vs. Commercial Union Assurance Co.*, 1 App. Cas. 498, 2 Aspinall's Mar. Cas. 100, cited in *Hastorf vs. Greenwich Ins. Co., supra,* plaintiff's vessel was insured against fire by the defendants under a policy of insurance expressed to be

> "on the hull of the steamship Indian Empire, with her tackle, furniture, and stores on board belonging, lying in the Victoria Docks, London,

with liberty to go into dry dock and light the boiler fires once or twice during the currency of this policy."

There was no dry dock attached to the Victoria Docks, but there was a pontoon dock, called the Thames Graving Dock, attached to the Victoria Docks, in which repairs ordinarily executed in a dry dock could be done, but the vessel was too large to go into it. Preventive measures against fire, and appliances for extinguishing it, existed in the Victoria Docks and the Thames Graving Docks. The vessel was towed from the Victoria Docks to the nearest convenient dry dock, her paddle wheel having been taken off in the Victoria Docks in order to enable her to go into the dry dock. After completing her repairs in the dry dock and coming out of it, she was taken up the river Thames to a buoy some few hundred yards above the dry dock, and there moored for ten days in order that her paddle wheel might be replaced. This was according to the ordinary course pursued by ship builders; but the vessel might have been towed at once to the Victoria Docks, and have had her paddle wheel replaced there, though at a far greater expense. The vessel was burned at her moorings, during the currency of the policy, and the defendants disputed their liability; held, on appeal affirming court below, that

the ship was covered by the policy while in the dry dock and while going to and returning therefrom, but not during the time she was moored in the river for a purpose unconnected with the transit.

In *Birrell vs. Dryer,* 9 App. Cas. 345, 5 Aspinall's Mar. Cas. 267, cited in *Hastorf vs. Greenwich Ins. Co., supra,* where the shipowner claimed against underwriters of a time policy of insurance as for a total loss, and the underwriters resisted the claim on the ground of a breach of a warranty in the policy. The warranty was "No. St. Lawrence" between certain dates, and it was admitted that the vessel had navigated the Gulf of St. Lawrence within the prohibited time, but the owners contended that the warranty applied only to the river St. Lawrence. It was proved that the navigation of the Gulf was dangerous that season but less so than that of the river. Held, by the House of Lords, that in the absence of any evidence to that effect the words of the warranty disclosed, no ambiguity or uncertainty sufficient to prevent the application of the ordinary rule of construction as to negative words, and that both the Gulf and the river were prohibited; Lord Blackburn said:

> "Reliance was placed by some of the judges below on the maxim *'fortius contra proferentem'*. I do not think the description of the dis-

trict excluded can be considered as the words of one party more than the other. The ship-owner, knowing where he is likely to employ his ship, and that he does not intend to use her in some district, generally puts on the ship a description of that district in order to induce the underwriters to agree to a lower premium.

"I am by no means prepared to say that in some cases where the description of the excepted district is special, it may not be right to say that these are the words of the assured. But where the description is, like this, general, I think that the assured has a right to suppose that the underwriters understand that description as they ought to understand it. It is alike for the interest of assured and underwriters that the description should be definite; and that is attended to in the warranty 'no British America between the 1st of October and the 1st of April'. No one could imagine that there was a material difference in the risk between a voyage from the most northern part in the United States, and one from the most southern part of British North America, or between a voyage commenced on the last day which is not prohibited, and one commenced on the first day which is prohibited. But a fixed limit is agreed on to prevent disputes."

IV.

Applying these principles to the case at bar, the court must find: That it was the intention of the parties, under the express warranty, to have the policy limit the extent of the risk assumed to a loss occurring while the vessel was

(a) "employed in the general freighting and passenger business";

and while the vessel in such employment was

(b) "on Puget Sound, within a radius of thirty miles from Seattle".

It would do violence to its language to hold that the policy covered a risk while the vessel was not so employed and while, in fact, it was out of commission and laid up for the winter and not in any employment whatever.

Certainly being "employed" is diametrically opposite in its meaning to being "unemployed".

The insurer was at liberty to select the character of the risk he was to assume, and having exercised that right by limiting that risk to a loss occurring while the vessel was "employed", the assured cannot now complain, when by an act of its own the vessel became "unemployed" and a loss occurred, because the insurer denies liability.

And it would do equal violence to its language to hold that the policy covered a risk while the vessel was *not* on Puget Sound at all but laid up for the winter in the Duwamish River. Duwamish River, as well as Puget Sound, are well-known geographical divisions, each capable of being definitely plotted on chart or map with reference to degree,

minute and second of latitude and longitude, and each occupying a separate and distinct portion of the earth's surface.

Puget Sound is an arm of the Pacific Ocean, generally speaking, without channel or current, with defined shores, level but rising or falling as a body with tides, salt in its character, and therefore of greater specific gravity than "water" that is fresh water. On the other hand, the Duwamish River is a body of fresh water having its source in the mountains and discharging its waters through its "mouth" into the sea, having a well-defined channel between well-defined banks, and, by reason of its source being at a higher altitude than its mouth, having an appreciable current always setting one way—flowing to and into the sea. Its freshness and its flow above its mouth are affected by the flood tides of Puget Sound (so are the waters of the Columbia for one hundred miles up from its mouth affected by the ocean tides); but that does not transform any part of the Duwamish River between its source and its mouth so affected, into Puget Sound—if it did, we would have *Puget Sound* within the mouth of the river and up the river towards its source, so far as the river is thus affected by flood tide, and *Duwamish River* at low water when that area is unaffected by the tides.

The words of the express warranty would be purposeless if the policy should be held to assume a risk of loss occurring whether the vessel was employed or unemployed, whether the vessel was on Puget Sound or in the Duwamish River, or in Lake Washington, or in Lake Union, or in the Black River, or in the White River, all within a radius of thirty miles from Seattle.

The learned judge below, in his memo-decision on the merits to support the position that the place where the vessel was laid up, "at the mouth of the Duwamish River", was within the limits prescribed by the policies in suit, cites *Insurance Co. vs. Clark,* 157 S. W. 291, where the policy provided, in a type-written clause, that it should be in force only while the vessel was used in the gulf waters of the United States between Key West and the mouth of the Rio Grande River, and the printed form of the policy declared it was the intention of insurer to indemnify insured for loss to vessel against perils of the harbors, bays, sounds, seas, rivers and other waters as above named. The vessel was lost in a river in which the tide ebbed and flowed; Held, that it was lost in Gulf waters within the purview of the policy; the expression "Gulf waters" like the word "sea" including not only the high seas, but the bays, inlets

and rivers as high up as the tide ebbs and flows; and citing *Waring vs. Clark,* 46 U. S. 441, to the effect that the "sea" as defined by the admiralty courts means, not only the "high seas" but the arms of the sea, waters flowing from it into ports and havens, and as high up rivers as the tide ebbs and flows, and holding further that—

> "if such be the sea, certainly gulf waters may be construed to mean the waters as high up rivers, as the tide ebbs and flows; again, that waters within the ebb and flow of the tides are considered the sea, is decided in the matter of *In re Gwin's Will,* 1 Tuck. (N. Y.) 44. See also, *Cole vs. White,* 26 Wend. (N. Y.) 516".

In *Ins. Co. vs. Clarke, supra,* the policy covered "the gulf *waters*" and "the harbors, bays, sounds, seas, rivers, and other waters as above named", and in its opinion the court (the Court of Civil Appeals of Texas) cites *Crary vs. Port Arthur, etc., Dock Co.*, 92 Tex. 275, 47 S. W. 967, wherein the Supreme Court of Texas, in construing the phrase "waters of the Gulf of Mexico" as used in Art. 721 of the Rev. Statutes of that state relating to constructing, owning and operating deep water channels from the waters of the Gulf of Mexico along and across any of the bays on the coast, etc., say:

> "We think the language in question is far more comprehensive than it would have been had the statute read 'from the Gulf of Mexico.'"

In the case at bar, the language of the policies is not "waters of Puget Sound — harbors, bays, sounds, seas, rivers, and other waters as above named", but "Puget Sound within a radius of thirty miles from Seattle".

We submit that the fact that the vessel was, at the time of the loss, neither employed in the general freighting and passenger business or any other business or trade, nor on Puget Sound within a radius of thirty miles from Seattle, violated the express warranties of the assured, and the appellants are not liable for the loss under the policies.

For these reasons we submit the learned Court below erred in its memo-decision, in finding:

1. That the form of policy in issue covers a vessel when laid up;

2. That the place where the boat was moored or laid up was at the mouth of the Duwamish River;

3. That the place where the boat was removed or laid up was within the limits prescribed by the policy;

4. That this place was a customary and usual place where vessels were laid up;

5. That this place was considered safe in shipping circles;

6. That this was on Elliott Bay;

And in concluding that there was no breach of the warranty.

(5th, 6th, 7th, 8th, 9th, 10th and 11th Assignments of Error.)

FOURTH.

Abandonment Waived.

The appellee failed to exercise diligence to float the vessel and to ascertain the extent of the damage, thereby waiving its right to abandon.

The Court below in its ruling on exceptions, held that the appellee had by delay waived its right to abandon, but subject to leave being granted to further amend the libels if appellee claimed any justifiable delay. The third amended libels do not allege any abandonment.

The vessel sunk on December 15, 1907; was floated January 11, 1908; hauled out and cleaned February 12, 1908; survey completed April 15, 1908; all of these things happened and were done and performed within the corporate limits of the City of Seattle, the place of business of appellee.

Captain Gibbs, one of the appellee's surveyors, and witness for appellee, testified, on direct examination, that there was delay in getting the vessel out of the water; that it took Captain Sloan, who had the contract from appellee for hauling the vessel out, "a long time to lay his ways and get ready to haul the vessel out. He carried away a great deal of his gear in trying to pull her out. He went to work the wrong way. After he notified us she was ready to survey, we went down and found her stern still in the water, so we couldn't" (Record, p. 38); that it appeared to witness that Sloan took a great deal longer time than was necessary to do it (hauling out and getting her out so survey could be made); that "it was evident to us he went to work the wrong way and used up a good deal of time and money" (Record, p. 39).

Gerald Lowe, in charge of Johnson & Higgins, insurance brokers for appellee, witness for appellee, testified, that the vessel "was hauled out and cleaned the same month she was floated, the end of January, 1908" (Record, p. 113); that it then took until April to ascertain the extent of the damage; and when asked "why did it take until April", answered:

> "The principal difficulty was that it was impossible to get the agent, surveyor of the

> underwriters to say what the damage was" (Record, p. 113); and further testified: "I kept pressing them (the owners) for Captain Gibbs' report as to what her damage was. They told me they could not get it, so they did secure the delay" (Record, p. 119), *i. e.,* owners instructed Johnson & Higgins, then brokers, to delay notice of abandonment (Record, p. 119).

This "surveyor of the underwriters" was Captain Gibbs, holding the position at Seattle of surveyor for the San Francisco Board of Marine Underwriters, who testified when called by appellee that he was acting at the request of owners of the vessel (Record, p. 45) and he had no instructions from the Underwriters at that time to act for them (Record, p. 45), and whom the Court below, in its memo-decision on the merits, found was not authorized to act for respondents (appellants) but was employed, with Mr. Frank Walker, by the owners of the vessel (Record, p. 201).

So we have a delay in hauling the vessel out by Sloan, who, as between appellants and appellee, was appellee's agent; and we have a delay in saying what the damage was by Gibbs, who, as between appellants and appellee, was appellant's agent; and the failure of appellee to have Mr. Walker, the other of appellee's surveyors, advise as to damage until

Captain Gibbs finally stated what the loss was (Record, p. 113).

For these reasons, we submit that the learned Court below erred in its memo-decision in finding:

1. That from the time the vessel was sunk reasonable diligence was exercised by the owner to float the vessel and to ascertain the extent of the damage.

2. That reasonable care was exercised in arranging for raising the vessel.

3. That there was nothing which showed that libellant was negligent (in raising the vessel).

(2d, 3d and 4th Assignments of Error.)

FIFTH.

Partial Loss.

That the proofs fail to disclose the amount of the loss and damage, sustained by appellee by reason of the sinking of the vessel, recoverable under the policies.

There was no actual total loss. It is an elementary principle in marine insurance that, without a valid abandonment on the part of the assured

(or the waiver thereof on the part of the insurer) there can be no recovery for a *constructive* total loss.

2 Arnould Insurance, 7th Ed., Secs. 1043, 1091.
2 Parsons Mar. Insurance, p. 185;
Sec. 2705, *Civil Code of California.*

There having been no actual loss and no abandonment to sustain a claim for constructive total loss, the appellee's claim, if valid, is limited to a *partial loss.*

And, assuming that the appellee has sustained a partial loss within the conditions and express warranties of the policies, what would be the amount of its recovery herein?

The sound value of the steamer, let us assume, is the "agreed value" as contained in the policies, towit—$15,000.00.

The salved value, let us assume, was what she brought at sale subsequent to sinking and hauling out, towit—$750.00.

The depreciation would thus be $14,250.00.

But bids or proposals to repair the vessel in accordance with the specifications contained in the report of the marine surveyors, Gibbs and Walker (Appellee's Exhibit "C"), were received from re-

sponsible parties and offered in evidence; the lowest of such bids was in the sum of $14,027 plus old material.

Taking the measure of the partial loss in the sum of the lowest bid for repairs, $14,027.00, what would be the measure of the recovery against respondents for such *partial loss?*

The policies provide, clause 8, as follows:

> "It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by perils insured against (except on anchors, copper and calking under the copper), as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage and their proceeds deducted from the gross loss."

Other provisions follow where remetaling, including docking and calking, is necessary but it does not appear that the vessel was copper bottomed and such provisions therefore are not applicable to the case at bar.

The policies provide also that the provisions of the Civil Code of California shall govern and control the liability of respondents. That Code provides:

> "Sec. 2702. Every loss which is not a total loss is partial".

"Sec. 2737. *Partial Loss.* A marine insurer is liable upon a partial loss, only for such proportion of the amount insured by him as the loss bears to the value of the whole interest of the insured in the property insured".

"Sec. 2746. *One-third new for old.* In the case of a partial loss of a ship or its equipment, the old materials are to be applied towards payment for the new, and whether the ship is new or old, a marine insurer is liable for only two-thirds of the remaining cost of the repairs except that he must pay for anchors and cannon in full; and for sheathing metal at a depreciation of only two and one-half per cent for each month that it has been fastened to the ship".

In the specification for repairs (Exhibit "C"), it was provided "all old material to become the property of the contractor". What the value of this old material was does not appear anywhere in the record; but the allowance of the old materials to the contractor eliminates the deduction of the value of the old materials from the gross loss, determined by the bid for repairs.

If the work required to be performed and material required to be furnished under the surveyor's specifications were solely in the language of the policy, for "repairs attributable only to the perils insured against," and did not include "such repairs as are due only to wear and tear or the original

defects, natural decay or depreciation of the vessel," then in that case the appellants would be liable (under Sec. 2737 C. C. C.), if at all, for such proportion of the amount insured by them as the loss (after deducting one-third new for old) bears to the value of the whole interest of insured in the property insured. That is:

Cost of repairs	$14,027.00
One-third off new for old	4,675.66
Net loss to insured	$ 9,351.34
Valuation of whole interest	$15,000.00

Net loss is sixty-two and four-tenths of valuation of whole interest.

Assuming repairs attributable only to perils insured against, appellants' liability, if any, would be—(exclusive of interest and exclusive of their proportion of salvage charges):

1. Yang-Tsze 62 4/10% of $3,000. or $1,872 instead of $2,850. as per final decree.

2. Canton 62 4/10% of $4,000, or $2,496 instead of $3,800. as per final decree.

But were the repairs required in the specifications attributable *only* to perils insured against *or* attributable to those perils *and* also due to wear and

tear or original defects, natural decay or depreciation of the vessel?

The cost of repairing the vessel as shown by the bid, towit:—$14,027.00 is 93% of the value of the vessel as agreed upon in the policy and 82% of the cost of the vessel to libellant. When we consider that this vessel had not been in collision, had not stranded while under way, or otherwise met with violence, but had simply sunk at her moorings in a depth of water not sufficient to cover her, it is reasonable to assume that the specifications and the bid for repairs under those specifications covered not only items of repair attributable to the perils insured against but also items of repair due to wear and tear, natural decay, and, depreciation of the vessel which in December, 1907, at the time of her sinking, was sixteen years old.

The specifications call:

(1) for renewals of seventy items, among others, as follows: Steering gear, where necessary; *main deck, renewed from stem to stern;* stern, renewed from first scarph below main deck clean up; engine room, strongback and stanchion renewed; upholstered seats renewed in smoking room and ladies' cabin; curtain shades, linoleum renewed; individual chairs renewed; machinery; marine engines, etc.,

damaged and missing parts replaced by new; all steam and pressure gauges replaced by new; entire electric wiring throughout vessel to be replaced by new; and

(2) in addition to the renewals, for engineer's stores and tools and certain equipment and outfit *to be supplied.*

The report of the surveyors omits to discriminate between the repairs attributable only to the *perils* insured against and such repairs as were necessary from *wear and tear* or to the *original defects, natural decay or depreciation* of the vessel, which discrimination is expressly required in Rule VI for Adjustment of Marine Losses printed on the back of the policies in suit and expressly made a part of the contract of insurance by clause 3 in the body thereof; and which rule expressly provides: that insurers shall not be obliged to accept any adjustment on a vessel based on a survey which omits to make such discrimination.

The burden was on the appellee to see that a proper survey was made in order to recover, particularly where the surveyors are acting at the request of the owners.

Rule IX, of Rules for Adjustment of Marine Losses, above referred to, provides that the selection and appointment of surveyors shall be agreed upon beforehand by the assured and insurer or their representatives; and that no representative of the insurer shall be expected to certify, approve or accept any surveys made in contravention of this rule; but such documents shall be deemed to be wholly *ex parte* in character and as such open to criticism or liable to be rejected altogether.

Nor can a discrimination of repairs attributable to perils insured against and repairs due to wear and tear, original defects, natural decay or depreciation, be gathered from the bids for repairs submitted, which were two in number (Appellee's Exhibits "F" and "G") and were each in a lump sum for the requirements under the specifications.

Those Rules for Adjustment of Marine Losses further provide (Rule VII) that:

> "When bills for repairs are presented which include items indifferently specified—(and such are the bids for repairs based on the surveyor's specifications in the case at bar)—chargeable partly to owners and partly to underwriters, and having no reference to discriminations in the survey, the adjuster shall require the claimant or master to separate the charges in

> accordance with the survey. Failure wherein, the adjuster shall refer the bill back to the maker thereof with a request to separate the items, so as to correspond with the survey. Failing in *both,* it shall be the custom to charge the *whole of the unspecified items* to the 'owner's' column.' "

The application of this rule requires the entire estimated cost of repair to be charged to "owner" for want of discrimination in the survey between repairs attributable only to the perils insured against and such repairs as are due only to wear and tear or to the original defects, natural decay or depreciation of the vessel; and also for want of such segregation in the bids for repairs.

Doubtless the surveyors, in making their report including specifications, were controlled by the intention, expressed to them, of libellant to abandon and claim as for a constructive total loss, when discrimination and segregation would be quite unnecessary. But the attempted abandonment (delayed until estimate of cost of repairs complete on April 15, 1908) has been adjudicated in the case at bar as untimely and the libellant put to the necessity of presenting a claim as for *partial loss.* This, however, does not relax the requirements of the Rules VI and VII as to discrimination and segregation.

The burden on the appellee has not been met or undertaken.

The Court cannot, from the record in this case, determine what discrimination and segregation should be made, and even though it should find the loss within the express warranties of the policies, the amount of such loss by reason of the perils insured against and the liability of appellants therefor under the policies cannot be ascertained.

The necessity of strictly applying the rules referred to is particularly obvious when it is remembered that the VASHON was built in 1891 and was therefore sixteen years old when she sustained the loss complained of. (See Certificate of Enrolment incorporated in Bill of Sale, Appellee's Exhibit "A".)

There is no evidence upon which to base a decree for a partial loss.

For these reasons we submit that the learned Court below erred in concluding libellant entitled to recover amount of policies, in directing a decree be entered and entering a decree in favor of libellant, and in not entering a decree dismissing the third amended libels.

(12th, 13th, 14th and 16th Assignments of Error.)

We submit that the decree of the Court below should be reversed with instructions to that court to dismiss the third amended libels with costs to appellants.

Respectfully submitted,

WILLIAM H. GORHAM,
Proctor for Appellants.

UNITED STATES
CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CANTON INSURANCE OFFICE, LIMITED, a corporation,
THE YANG-TSZE INSURANCE ASSOCIATION, a corporation,
Appellants,

vs.

INDEPENDENT TRANSPORTATION COMPANY, a corporation,
THE CHINA TRADERS INSURANCE COMPANY, a corporation,
Appellees.

No. .....

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF FOR APPELLEE

KERR & McCORD,

3109-16 Hoge Building
Seattle, Wash.

IRA A. CAMPBELL,

Merchants Ex. Building
San Francisco

Proctors for Appellee.

This cause comes to this court on appeal from the District Court of Washington, for review of a decree of that court against the appellants, Canton Insurance Office, Limited, for the sum of $6603.73, and against the Yang-Tsze Insurance Association for the sum of $4952.80; the judgment against the China Traders Insurance Company in the sum of $3308.86 having been paid.

The action is in admiralty on policies of insurance issued to the appellee, Independent Transportation Company, July 3rd, 1907, covering its steamer Vashon, then engaged in the summer trade between the City of Seattle and a summer resort at Alki Point, located about six miles south of said city. The policies were San Francisco Hull Time Policies, containing the usual clauses.

FACTS.

1. Appellee, Independent Transportation Company, is a corporation duly organized and existing under the laws of the State of Washington, and at all times in the libel mentioned was the sole owner of the steamer Vashon. (Ex. A, Ev. of Hamilton p. 30.)

2. Appellants are each insurance corporations duly organized and existing with authority to transact business within the State of Washington.

3. On July 3rd, 1907, for a valuable consideration, the appellants, respectively, issued to the appellee, their time policies of insurance covering the vessel for one year from July 3rd, 1907, to July 3rd, 1908, said policies being for the sum of $4000 and $3000, respectively.

4. Each of these policies insured appellee upon its interest as owner on the body, machinery, tackle, apparel and other furniture of said steamer Vashon, against the perils of the sea, etc; "and all other losses and misfortunes that shall come to the Vashon or damage to the said vessel insured, or any part thereof, to which insurers are liable by the rules of insurance in San Francisco, including the rules and adjustment of losses printed on the back of such policies, and the provisions of the Civil Code of California," etc.

The policies further provided in case of any loss or misfortune resulting from any peril insured against, the party insured should sue, labor and travel, etc.

Each policy contained this further provision, "Vessels warranted employed in the general pas-

senger and freight business on Puget Sound within a radius of thirty miles from Seattle." (Exhibits F, G, H.)

5. At the time these policies were written the Vashon was known to the appellants to be engaged in carrying passengers from Seattle to Alki Point, a summer resort, and a suburb of Seattle, about six miles south and across Elliott Bay, from the City of Seattle.

6. In August, 1907, the steamer Vashon discontinued her summer run to Alki Point and was moored until about December at the King Street Dock in the City of Seattle in Elliott Bay. (Testimony Hamilton 61-62.)

7. About the first of December, 1907, the Vashon was removed from King Street Dock and securely moored near the mouth of the Duwamish River, a tributary of Elliott Bay and within the tidal waters of Puget Sound.

(See libellants' Exhibit E, Testimony Hamilton 63, Capt. Warner 95, 97, 98.)

8. On December 15th, 1907, the steamer Vashon sunk at her moorings.

9. On December 16th, 1907, her owner notified Captain Stephen B. Gibbs, Surveyor for the San

Francisco Board of Marine Underwriters of the mishap to the steamer and employed Frank Walker, a marine surveyor, to represent it. On the afternoon of the 16th of December, 1907, Messrs. Gibbs and Walker visited the scene of the accident where they made a partial survey and reported (Libellants' Exhibit C):

> "Upon making a careful examination at low water we found the vessel to be laying with her head to the East and on the north bank of the river, the saloon deck being awash on the port side forward, the starboard side of the stern the wheel and the starboard rudder were resting heavily on the bank; at high water a part of the pilot house and the after starboard side of boat deck were the only parts of vessel unsubmerged."
>
> "We recommend that a diver be employed to examine the bottom of river and bottom of vessel, that all openings be made tight, and that four sets of dolphins be driven and capped, one set on each bow and one set on each quarter, that heavy cables be passed under vessel and led to purchases rigged at the head of each set of dolphins, that the necessary scows, pile drivers and tugs be employed and when all preparations were complete, the necessary pumps be placed in position and upon her main deck line being raised to the surface of the water, the hull be pumped out."

The surveyors' report continues:

> "The above recommendations were carried out and on January 11th, 1908, the vessel was floated and moored to the dolphins by which she was raised."

> "Upon making a further examination after floating, we found her in such a filthy condition with fuel oil and river mud that it was impossible to ascertain the extent of damages, therefore we recommend that arrangements be made to haul the vessel out of the water, remove two strakes of planking, from her bottom and thoroughly wash out all loose dirt to enable us to make a survey in detail."

10. Thereupon the appellee proceeded at once to carry out the recommendations of the surveyors. The vessel was raised and moored January 11th, 1908, by Captain Genero and Mr. Finch with great difficulty (testimony Gibbs 36, 37; Walker 83-85) at an expense of $3964.80. (Transcript 70.) This work "was carried on with all the diligence possible" (Ev. Capt. Gibbs, Rec. 37; Hamilton 67, Walker 65, 85). The surveyors proceeded at once to effect arrangements to haul out and dock the vessel, and after interviewing several parties, let a contract to Sloan Bros. to haul her out (Ev. Gibbs 38, Walker 83). "It took Sloan a long time to lay his ways and get ready. He carried away a great deal of his gear in trying to pull her out. He went to work in the wrong way" (Ev. Gibbs 38, Hamilton 67). "Sloan was competent." "He got her only partly out of the water." "We were urging him to make haste." "He did not get the vessel out of the water and ready for survey until April 15th,

1908." "We endeavored to make a survey when the vessel was partly out, but it was unsafe to do so." (Ev. Gibbs 48, Walker 65). The owners were not responsible for any of this delay." (Ev. Gibbs 41, Walker 86, Hamilton 67.) The expenses incurred in raising, hauling out and cleansing the vessel was $3964.80. (Rec. 70.)

11. On April 15th, 1908, the final survey was made. (Ex. C.) The report proceeded:

> "Vessel was towed to Messrs. Sloan Bros. shipyard, where she was hauled out and cleaned, and upon making a careful examination of the vessel we found the damage to be very extensive and hereby recommend that in the event of the vessel being repaired, said repairs be made as per attached specifications."

12. Captain Gibbs thereupon negotiated for bids for the repair of the vessel. Upon April 16th, the day the survey was completed Hall Bros. Marine Railway and Shipbuilding Company submitted a bid for $23,500, the work to be completed in sixty days (see Ex. G), and on April 27th, 1908, Heffernan Engine Works submitted a bid for repair work at $14,027, time required *four* months. (See Ex. F.)

13. Immediately on the receipt of the report of the surveyors and on April 15th, 1908, appellee gave notice of abandonment both by wire and in writing to each of the appellants (Libellants' Ex-

hibit L) and on April 17th, 1908, furnished complete proofs of loss as required by the policies (Ev. Lowe 111, Ex. 3).

14. Captain Gibbs, surveyor for the Underwriters, sold the vessel for $750, which was her full value in her damaged condition (Ev. Gibbs 51). Her sound value was $15,000.

15. It is customary for marine underwriters on the Pacific Coast to hold vessels covered by San Francisco form of hull time policy while laid up, in the absence of a provision in the policy for the return of the premium.

Witnesses for Appellee:

Ev. Frank G. Taylor..... 91
Ev. Lowe 111
Ev. LaBoyteaux 194
Ev. J. B. Levison.....197

Witnesses for Appellants:

Ev. Rosenthal 150
Ev. Pinkham 153
Ev. Smith 158
Ev. Thompson 163
Ev. Barneson 173
Ev. Alexander 177

ARGUMENT.

In the trial court proctor for appellant discussed four questions:

1. Had libellant an insurable interest at the time of loss?

2. Warranty as to time.

3. Was the abandonment timely?

4. Was the loss total?

The first question has been eliminated by stipulation.

SCOPE OF WARRANTY.

Appellant will contend that the words written into a time policy: "Warranted employed in general freighting and passenger business within a radius of 30 miles of Seattle" *mean "Warranted to be continuously so employed".*

> "The rule that contracts of insurance must be liberally construed in favor of the insured does not authorize the court to put into an insurance contract words that would make a radical change in its meaning, or that would

make for the parties a contract they did not themselves make."

N. W. Ins. Co. vs. Nesfus, 140 S. W. 1026.

Judge Hanford construed this warranty in 173 Fed. 564, upon exceptions to the libel and answered appellant's contention as follows:

> "The respondents contend for the principle that insurers are entitled to insist upon strict and literal compliance with special warranties, and deny the right of libellant to introduce parol evidence to explain or vary the terms of the warranty clauses. This argument recoils, for application of a rigorous rule defeats the purpose for which it has been invoked in these cases. Unless the rules of grammar shall be disregarded, or the phraseology of the warranty changed by a somewhat liberal construction, there is no apparent breach. It is not pretended that the record shows that the Vashon was not employed in the general passenger and freighting business on Puget Sound when the policy was issued. The word "employed" is a verb of the past or present tense, and cannot be accurately used potentially to indicate future action, unless qualified by additional words not found in these warranty clauses. The argument for the respondents assumes that the warranties relate to future employment of the vessel during the life of the policies and that the clauses should be interpreted to read: 'Vessels warranted to be employed in the general passenger and freighting business on Puget Sound'. The interpolation of the words 'to be' would materially change the meaning of the clause, and it is not permissible to thus interpolate in order to change the meaning of a contract

> which courts are required to enforce strictly according to the terms assented to by the parties. Exception is overruled."

In *St. Nicholas Company vs. Merchants Investment Company,* 11 Hun. 108, the policy by its terms purported to cover the vessel "while running on the Hudson and East Rivers," but the court held that this language did not restrict the insurance to the time the vessel was in motion.

> "A warranty 'to sail with a convoy' requires that the vessel join and depart with a convoy from the customary place where convoys are to be had, and it is no breach of warranty that she does not continue with a convoy during the whole course of the voyage."

Manning vs. Gist, 3 Dougl. 74.

Harrington vs. Halheld, 2 Park Ins. 634.

Jeffrey vs. Lyender, 3 Lev. 32.

A statement in a policy "that a vessel is intended to navigate certain waters is not a warranty that she shall actually navigate them.

Grant vs. Aetna Ins. Co., 12 L. C. Rep. 386.

A warranty of neutrality "is merely that the property is neutral at the time the risk commences and not that it shall continue neutral throughout the adventure".

Colbreath vs. Gracy, 4 Fed. Cas. No. 2296.

"A stipulation in a policy on a boat that it shall be completely provided with 'Master, Officers and Crew' is not broken by placing the boat temporarily in charge of workmen for the purpose of repairs."

St. Louis Inv. Co. vs. Glasgow, 8 Mo. 713.

"The same rules of construction which apply to all other instruments apply equally to contracts of marine insurance. The intent of the parties is to be ascertained by construing the policy according to its sense and meaning as collected from the terms used in it, due effect being given to every part; and the terms are themselves to be understood in their plain, ordinary and popular sense, unless the context shows an intent to use them in some other special and peculiar sense. The contract is to have a liberal construction in favor of the insured, particularly as to limitations and exceptions where there is doubt or ambiguity."

26 *Cyc.* 279 and cases.

"The contract must be construed with relation to the general and established usages and conditions of a particular trade or business with reference to which the insurance has been effected, which usages and customs the insurer is bound to learn."

26 *Cyc.* 381 and cases.

This insurance was written on the steamer Vashon for one year, which vessel was then known to be engaged on her summer run.

Testimony was taken on behalf of both parties as to the meaning of the words "Warranted employed", and as to the customs under such policy by which she is deemed covered, no demand having been made for a return premium.

J. B. Levison, Vice-President of the Firemen's Fund Insurance Company, testified (Transcript 197-8) that under the Hull Time Policy the vessel was covered while laid up whether return premium is demanded or not.

To the same effect is the testimony of LaBoyteaux (page 194) Marine Adjuster with Johnson & Higgins.

To the same effect see testimony of Frank G. Taylor of Firemen's Fund, pp. 91, 93.

To the same effect see testimony of Gerald Lowe, Average Adjuster with Johnson & Higgins, page 111.

Appellants' witnesses testified as follows:

Louis Rosenthal construed the words "Vessel warranted employed" to mean that "the vessel from the inception of the policy and during its life must be employed in the general passenger and freighting business on Puget Sound."

Q. Are vessels usually or not usually held covered when laid up?

A. They are usually held covered, especially when they are laid up in customary and usual places. (See pp. 151-152.)

Harry Pinkham testified (pp. 153-4) that under the warranty the Vashon should "be confined to the trade as stated by the clause",—that the warranty "touches the employment of the vessel and restricts her trade to certain waters", but that under the S. F. Hull Time Policy, the vessel is covered both when laid up "and while in commission."

H. F. Smith construed the warranty as follows:

> "This indicates that the vessel is to be employed in general passenger and freighting business on Puget Sound during the life of the policy (p. 156); that the warranty touches the character of the employment (p. 158). I think they (vessel) would be held covered while laid up whether they notified the Company or not, if they did not require a return premium." p. 160.)

Mitchell Thompson testified (p. 163) that he construed the policy to mean that *"while she is employed,* she is to be employed in that particular trade and in those particular waters", and that in his opinion under the S. F. Hull Time Policy the

"vessel is covered while laid up—if the hazard is not increased by so doing." (p. 163.)

Capt. John Barneson testified (p. 169) that the warranty touches the character of the vessel's employment; that under the S. F. Hull Time Policy "a vessel is covered while laid up." (p. 173.)

Edgar Alexander testified (p 177) that the words "warranted employed, etc., touched the character of employment and the vessel would be covered while laid up".

J. J. Theobold construed the word "warranted" to be synonomous with "engaged". (p. 182.)

All the witnesses are agreed that the Vashon was covered while laid up; that the words "warranted employed" meant that while employed she must be employed in passenger and freighting business within a radius of 30 miles of Seattle.

The appellants are both members of the San Francisco Board (Testimony Levison, p. 196) and are charged with knowledge of the customs for which all these witnesses have vouched.

In *Hazzard vs. Insurance Co.,* 8 Pet. 557, 582, the court say:

> "The underwriters are presumed to know the usages of foreign ports to which insured

> vessels are destined; also the usages of trade and the political conditions of foreign nations. Men who engage in this business are seldom ignorant of the risks they incur, and it is to their interest to make themselves acquainted with the usages of the different ports of their own country and also of foreign countries. This knowledge is closely connected with their ordinary business and by acting on the presumption that they possess it, no violence or injustice is done to their interests."

Mr. Alexander testified (p. 176) that the expression "warranted employed" was ambiguous.

Mr. Justice Story in *Livingston vs. Maryland Ins. Co.,* 7 Cranch 506, says:

> "If the expressions are ambiguous or such as the parties might fairly use without intending to authorize a particular conclusion, the insured ought not to be bound by the conjectures or calculations of probability of the underwriter."

Ins. Co. vs. Reed, 103 N. E. 77.

Stix vs. Ins. Co., 157 S. W. 870.

In *Oakland Home Insurance Company vs. Bank of Commerce,* 47 Neb. 717, the court say:

> "If the language were ambiguous in its grammatical signification, we would be compelled to adopt that construction which would be more favorable to the insured. Insurance policies are not contracts deliberated upon, clause by clause, and effected after detailed negotiations between insured and insurer. The

> actual contract is for the most part entered into before the policy is delivered. The policy is proposed and tendered by the insurer on its own form. If it seeks to protect itself by a condition, it should clearly express that condition by the policy. If it resorts to ambiguous language, under familiar rules of construction, such language must be taken most strongly against the party proposing it and in favor of the other party."

Boyd vs. Thuringia Ins. Co., 25 Wash. 452.

The warranty accordingly touches the employment of the vessel and does not contemplate that unless she is constantly in operation she is not protected by the policy. She was laid up at a usual place in the tidal waters of a tributary of Elliott Bay. No return premium was demanded and she was fully covered while so laid up.

The Vashon was laid up in the Duwamish River, at a usual place for mooring such vessels and at a place where the tide rises and falls from eight to ten feet.

Testimony of Gibbs..... 35
Testimony of Walker..... 81
Testimony of Warner.....97
Testimony of Hamilton..... 62

She was securely moored by Capt. Warner, a master mariner of experience, who drove piling for the purpose.

Testimony of Warner, pp. 95, 96, 97, 98.

See place of mooring attached to affidavit of Warner, Exhibit 3.

Affidavit of Faber attached to exceptive allegations, Stip. p. 155, Exhibit 3.

The Duwamish River is a tributary of Elliott Bay. The Vashon was moored but a few hundred feet from the tide flats and within the limits of the City of Seattle.

We invite the court's attention to *Insurance Co. vs. Clarke & Co.,* 157 S. W. 291, decided May 2nd, 1913. In this case the policies covered the vessel *"only while used in the Gulf waters between Key West and the mouth of the Rio Grande River."* She sank in the Atchafalaya River at Morgan City, Louisiana, *eighteen miles from the open Gulf,* but where the tide *sometimes* ebbed and flowed. The court say:

> "Appellant contends that the words 'gulf waters' should be construed according to their plain, ordinary meaning, and that so construed gulf waters are waters of the gulf, and river waters are waters of the rivers, and that river waters become gulf waters when they have flowed down to and into the gulf, and conversely, gulf waters become river waters when by the action of the tides or winds they have flowed or have been blown into the rivers; that as long as water is in the river it is river water and as

> long as it is in the gulf it is gulf water, and that therefore the provisions of the policy which limited the tug to gulf waters of the United States means just gulf waters or waters of the gulf and not river waters or waters of the river."

The court holds that this contention is too narrow that the vessel was covered *while in the tidal waters of the river,* citing *Waring vs. Clarke,* 46 U. S. 441, in which the Supreme Court defines the "sea" to mean not alone "high seas" but the arms of the "sea", "waters flowing from it into ports and havens and as *high up rivers as the tide ebbs and flows."*

The court adds:

> "If such be the sea, certainly gulf waters may be construed to mean the waters as high up rivers as the tide ebbs and flows,"—

That waters within the ebb and flow of the tide are considered the sea is decided in *Gwin's Will,* 1 Tuck (N. Y.) 44, and *Cole vs. White,* 26 Wend 516.

The insured vessel was accordingly moored in a much more protected place than the open bay, where she would have been buffeted by winds, and was within the radius referred to in the policies.

WAS THE ABANDONMENT TIMELY.

Proctors for appellants will contend the question of abandonment by notice is not involved.

On exceptions to the libel and in the absence of proof Judge Hanford held that *prima facie* a notice given four months after the sinking of the Vashon was not timely. (173 Fed. 564, 566.)

"For cogent reasons," he said, "the insured party is required to act promptly in giving notice of abandonment, when it is intended to claim a constructive total loss, and without reasons justifying delay for the period which elapsed in this instance."

The testimony now shows conclusively these facts:

1. The vessel was raised, hauled out and cleaned, preparatory to survey as expeditiously as possible, appellee and the surveyors, including Capt. Gibbs, representing the underwriters, at all times urging the work.

2. That on account of the great expense she could not be put on a dry dock, but was hauled out by Sloan Brothers Shipbuilders, who were required to construct special ways for that purpose, and

after the ways were constructed, that firm experienced much difficulty in accomplishing the task.

3. That the vessel was thoroughly slimed with fuel oil and the surveyors could not safely enter her to complete a survey until April 15th, 1908.

4. That all this work progressed continuously, appellee and the representative of appellants concurring.

5. That notice of abandonment was given *immediately* on recepit of the surveyors' report, both by *wire* and by *mail.* (Exhibit 2, Exhibits L, M.)

The mere lapse of time is never conclusive. The law requires reasonable expedition.

To justify the owner in abandoning, he must wait until sufficient details are at hand to enable him to form an opinion as to the situation and to make up his mind as to the course he will elect to adopt. When this information has reached him, he must act without delay.

Templeman on Marine Insurance, p. 47.

In the recent case of *Watjen vs. Indemnity Mutual Marine Insurance Company,* ....., it was decided that the owners were entitled to recover as for a constructive total loss, notwith-

standing the fact that the notice of abandonment had not been given for five months after the vessel arrived in practically a state of wreck. The facts in the case were these:

The vessel was towed into Hall's Sound, New Guina, on May 14th, 1903, badly damaged by stress of weather. She was subsequently towed to Singapore, where she arrived on August 16th. The cargo was then discharged and the vessel placed in dry dock for survey; the result of the survey being that the surveyor estimated the cost of repairs at a sum exceeding her value. The owner first received information concerning the accident about July 20th, and toward the end of September he received a telegram informing him of the result of the survey. On October 12th, 1903, notice of abandonment was tendered and refused by the Underwriters.

If the contention made by respondent in the argument of exceptions is correct, it would have been incumbent upon the owner in the Watjen case to have tendered abandonment upon the arrival of the vessel at Hall's Sound, but the fact that he waited several months for the result of the survey at Singapore, then waited a further period of time after the receipt of that information, was not con-

sidered by the court as a waiver of his right to abandonment.

> "That notice of abandonment must be given with reasonable diligence after receipt of reliable information of a constructive total loss, but where the information is of a doubtful character, the insured is entitled to a reasonable time to make inquiry."

Owens Digest Marine Insurance, p. 76.

In the House of Lords, case of *Rankin vs. Potter,* Justice Blackburn in his reply to certain questions propounded by the Lords, says:

> "What would be a reasonable time and whether the neglect to give notice of abandonment does determine the election, must depend in each case on the circumstances, and principally on what steps the Underwriters might take if they had notice."

And his Lordship then quoted the following from *Phillips on Marine Insurance*:

> "But the better rule in such cases is that if the insured neglect to abandon, he shall recover only according to the state of things at the trial. Since, as we shall see, under a declaration of a total loss, he may recover for a partial loss and the Underwriters ought to have the advantage of whatever may occur to make the loss partial, so long as the assured delays to elect a total loss. If he had judgment for a total loss, this is equivalent to an abandonment, and gives the Underwriters a right to salvage."

As to the validity of abandonment, Arnould says on page 1233 of his work:

> "That to make a notice of abandonment valid, it must be justified by the state of facts existing at the time it was actually given."

In *Young vs. Union Ins. Co.,* 24 Fed. 279, the court says:

> "It is further urged that the insured is charged with unreasonable delay in giving notice of abandonment,—the disaster to the schooner having occurred in November and the notice of abandonment not having been given until the 7th of March following, but I do not see under the peculiar facts in this case, how this delay can have worked any injury to the insurer. And if it did not, it seems to me it should not in any way impair or effect the rights of the insured in the premises."

Again:

> "Inasmuch as at the time the notice of abandonment was given, there was still ample time for the respondent to have repaired the schooner, or sold her without repair for the next season's business,—it seems to me it does not lie in the insurer's mouth to object to the delay."

Munay vs. Ins. Co., 72 Hun. 282.

Gardner vs. Ins. Co., Fed Cs. 5225.

The insured has a reasonable time, depending upon the circumstances of each case, within which to give notice.

Hortin vs. Phoenix Ins. Co., 1 Wash. U. S. C. C. 400.

Reynolds vs. Ins. Co., 22 Pick. 191, 193, 199.

Ins. Co. vs. Stork, 6 Cranch 268.

8 *Fed. Cases,* No. 4136.

26 *Cyc.* 702.

In the instant case it is beyond dispute that it was not until April 15th, 1908, that a complete survey was possible. On that day the survey was completed by Captain Gibbs, representing the Board, and Captain Walker, representing the appellee. Their report is supplemented with the detail of necessary repairs, and it was then manifest that the cost of repairs would exceed the value of the vessel. All parties were made acquainted with this report, including appellants who then had the opportunity to either repair the Vashon or permit her to be sold. They declined to repair her and assented to her sale at $750.

Capt. Gibbs testified that he consulted with the agents of appellants, who wrote the policies,—"told them what we were doing"; that "they knew the survey was being made"; that "in negotiating a sale he was acting in the interest of all concerned"; that he kept the Board advised as to "just what was

going on"; "that there was an understanding between the owners and underwriters by which he was authorized to make the sale"; and that the vessel "was disposed of for $750, which was her reasonable value in her damaged condition."

Testimony of Gibbs, pp. 42, 43, 57

Testimony of Hamilton, pp. 76, 77

Why should appellants be heard to complain of delay? Assuming, for the sake of argument, that the work of raising, hauling out, opening up and cleansing the vessel to the end that the extent of damage could be ascertained, was not as expeditious as it might have been, how were the insurers adversely affected? They knew just what was being done; and only when the survey was completed April 15th, and they ascertained the loss was total, did they refuse to abide the terms of the policies. The vessel was covered to the extent of $15,000, Six thousand of which was promptly paid.

In *Livingston vs. Insurance Company,* 6 Cranch 274, it is expressly held that the right to abandon may be held in suspense by the mutual consent or conduct of the parties, and we submit in the light of the action of the surveyors of the Board of Underwriters that the whole question of abandon-

ment was held in suspense until the report of the survey was made.

> "Information to warrant an abandonment must be of such facts and circumstances as would sustain an abandonment, if existing in point of fact at the time the notice is given."
>
> *Gosley vs. Company,* 22 Am. Dec. 337.

> "The offer to abandon must be founded on information of facts sufficient to justify the abandonment."
>
> *Radcliff vs. Coster,* 1 Hoff. Ch. 98.

Independent of notice of abandonment, appellees were entitled to recover for the total loss of the vessel.

> "To constitute an actual total loss it is not necessary that there should be a physical destruction of the thing insured. It is enough that its value to the owner for the purpose for which it was created is destroyed."
>
> *Park on Insurance,* 155.
>
> 2 *Arnould on Insurance,* 1022.
>
> *Robinson vs. Ins. Co.,* 68 N. Y. 192.

The mere fact that an insured vessel exists in specie does not necessarily prevent the insured from claiming a total loss without abandonment.

> *McCall vs. Ins. Co.,* 66 N. Y. 505.

The insured may abandon in every case where the thing insured is so damaged as to be of little or no value to the owner.

Peele vs. Ins. Co., 3 Mason 27.

Nash on Ins., 482.

In *Bullard vs. Insurance Co.,* Fed. Cs. No. 2122, I Carter 148, Judge Curtis instructed the jury as follows:

> "An abandonment is necessary only in case of a constructive total loss. If the loss be actually total, the insured may recover for it without abandonment. It has been much discussed what constitutes a total loss, when the vessel remains in specie and still retains the form of a vessel, in a place of safety. I shall not trouble you with the different views which have been taken of this question, but I will state the rules which I deem proper for your guidance. It is manifest that the form of a vessel may remain and be in a place of safety, and yet, for all useful purposes, the vessel may have ceased to exist. If she be absolutely incapable of repair, so as to be fitten to encounter the seas, then she has ceased to exist as a vessel, though great part of her materials may remain and they may still be in the form of a vessel. So, though capable of being repaired and restored to the condition of a seagoing vessel, yet, if this can only be done at an expense exceeding the value of the vessel when repaired, it is an expense which no one is bound to incur, and therefore the case is the same as if absolutely irreparable; there being no practical difference, for this purpose, between what cannot be done

> at all and what no prudent person would undertake to do. And, therefore, if you should find from the evidence in this case that the injuries suffered by this brig from perils of the sea were so great that they could not be repaired so as to make her a seaworthy vessel, except at an expense exceeding her value when repaired, then this was a case of actual total loss, and no abandonment was necessary."

This court in *Soelberg vs. Ins. Co.,* 119 Fed. 27, recognize the rule "that the mere fact that an insured vessel exists in specie does not necessarily prevent the insured from claiming a total loss without abandonment", stating that "Every case depends upon its own peculiar facts and upon the terms and provisions of the particular policy of insurance in question".

Immediately after the surveyors made their report they solicited bids for the repair of the Vashon. Two bids were received, that of Hall Bros., work to be completed in sixty days, $23,500; and that of Heffernan, work to be completed in *four months,* $14,027.

Now at that time expenses had been incurred in raising and hauling out and cleaning the boat, amounting to nearly $4000. So that the vessel was an actual total loss, and notice of abandonment was not required.

26 *Cyc.* 685 and cases.

Harvey vs. Ins. Co., 79 N. W. 898, 900.

Reynolds vs. Ins. Co., 22 Pick. 191, 193.

PARTIAL LOSS.

What we have just pointed out to the court fully answers appellants' claim that the loss was not an actual total loss and that recovery was limited to partial loss.

Proctors for appellants will contend that the sound value of the vessel was $15,000; that in her damaged condition she sold for $750; that the depreciation would thus be $14,250; that the lowest bid for repairs was $14,027.00 and that therefore the loss was not an actual total loss. But if we assume that the vessel could be repaired for even $14,027, the cost then incurred of $3,964.80 (testimony Hamilton 20) must be added, making the total cost of putting the vessel in sound condition of $17,991.80, or $2,991.80 more than her sound value.

Harvey vs. Ins. Co., supra.

Reynolds vs. Ins. Co., supra.

Appellants offered no proof to controvert any statement or estimate contained in the survey. There is no pretense of a claim that the price obtained for the vessel in her damaged condition was inadequate; there is no evidence that any delay which necessarily ensued in raising and hauling out the vessel resulted in any disadvantage to appellants. There exists no legal reason why the losses under these policies should not be paid.

After preparing the foregoing brief we received copy of appellant's brief. The question of jurisdiction was not presented to the trial court.

This action is based on two, time policies of marine insurance. The contract is accordingly maritime and "The admiralty will proceed to inquire into all its breaches and the damage suffered thereby, however peculiar they may be and whatever issue is involved."

Church vs. Shelton, 2 Curt. 271-274.

DeLovio vs. Boit, Fed. Cas. 3776.

Graham vs. O. R. & N. Co., 134 Fed. 464.

The attempt of the appellant to raise the question of jurisdiction in the light of the doctrine in

the *Dunham* case is highly technical. In that case it is held "The true criterion is the nature and subject-matter of the contract, as to whether it was a maritime contract, having reference to maritime services of maritime transactions". After reviewing the decisions the Supreme Court say:

> "It thus appears that in each case the decision of the court and the reasoning on which it was founded, have been based upon the fundamental inquiry whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depends not on the place where the contract was made, but on the subject matter of the contract. If that was maritime, the contract was maritime. This may be regarded as the established doctrine of the court."

Again the court say:

> "It only remains then to inquire whether the contract of marine insurance, as set forth in the present case, is or is not a maritime contract."

The court answers this inquiry in the affirmative.

The cases cited by appellant are not in point. This is not an action by a "watchman"; nor on a "contract of storage"; nor on a "fire policy" on a vessel used as a "hospital". The Vashon had not been "withdrawn from commerce", but was in all

respects a fully equipped steam vessel temporarily laid up until her summer run should be resumed. The policies are time policies, and the witnesses all agreed that they covered the vessel while laid up, no return premium being demanded. The contract remains the same as when written. The risks covered were identical. The mere laying up of the vessel did not change the maritime character of the contract. This court will examine the record in vain for the slightest evidence to sustain any claim that the insured vessel had been "withdrawn from commerce". Her field of operation had been temporarily closed.

This court in *Ried vs. Weule,* 176 Fed. 660, held that "a contract of sale of a chronometer as appertaining to a particular vessel is a maritime contract within the jurisdiction of admiralty, though at the time of sale it was on shore". The reasoning upon which that case was based was that the chronometer being necessary to the vessel and having been sold as appertaining to her, made the contract maritime.

The marine insurance in the instant case was taken out upon the steamer Vashon. The policies run for one year. The vessel was laid up in the tidal waters at the mouth of the Duwamish River.

The testimony shows that the vessel was covered by these marine policies while thus laid up, no demand for return premiums having been made. The insurance contract appertained to the vessel, just as much as the chronometer, and the mere laying up or mooring of the vessel could not change the character of the contract, provided she was covered while thus laid up.

Appellant contends that the words written into a time policy: "Warranted employed" mean, "Warranted employed *continuously* in general freighting and passenger business," for a period of one year.

The trial court held that those words properly construed, mean that the vessel, at the time the policy was applied for and issued, was so employed.

In *St. Nicholas Company vs. Merchants Insurance Company,* 11 Hun. 108, the policy by its terms purported to cover the vessel "while running on the Hudson and East Rivers", but the court held that such provision does not restrict the insurance to the time the vessel was in motion.

The policies were issued by the agents of the several respondents in Seattle and became operative only upon being signed and delivered by those

agents. They knew that this vessel was plying in the freight and passenger business between Alki Point, a summer resort, and Seattle. These agents knew that when these policies were issued she was engaged on a summer schedule.

Counsel indulges in many refinements and definitions which, standing alone, mean nothing. I use the phrase "John Doe is employed by me". By no possible implication can this language be distorted into an employment for a definite or indefinite time, or into language importing that I shall "keep him at work", or "keep him busy". The language simply imports that at that time John Doe is in my employ.

The word "warranted" adds nothing to the phrase employed in the policy. It would mean the same thing if it read: "Vessel employed or engaged in freighting and passenger business between Alki Point and Seattle".

If the insurance company had desired to provide that the vessel insured by it, must, under its time policy, be *continuously* engaged in actual operation in order to be covered, the policy should have so declared in unambiguous language. These insurance companies prepared these policies; libelant did not. If ambiguous, and respondent's witness Alexander

testified that they were, the insurance companies are to blame. They did not need to leave anything to be inferred. If their contention here is true every vessel covered by one of their policies is not protected while in dry dock, or while laid up for repairs, or while temporarily moored. If their contention is true the insured would not know when he was or was not covered.

Ins. Co. vs. Bank, 47 Neb. 717, *supra.*

Counsel say that "employed" implies a continuing state or condition. No, it implies an existing state or condition, having regard solely to the date when the policy became effective.

Appellant's counsel makes the sweeping statement that certain witnesses testified that the meaning of the words "warranted employed" etc., meant that the vessel "will be empolyed as indicated during the life of the policy".

The court will examine the testimony of these witnesses in vain for any such statement.

J. B. Levison testified:

> "Q. By that you mean that *when employed* the vessel must be employed in that way?
>
> A. I should say so, Mr. Campbell, of course it is quite usual for vessels to be unemployed at certain times."

Mr. Pinkham testified that

> "My understanding is that the vessel is warranted to be employed on Puget Sound during the life of this policy exclusively" (Rec. 153); that "the San Francisco policy will cover a vessel at all times whether laid up or in commission" (Rec. 154).

Mr. Smith after testifying that the underwriters would always prefer that all insured vessels should be laid up on account of risk, says (Rec. 161):

> "I think they would be held covered while laid up, whether they notified the company or not, if they did not require a return premium."

Thompson testified to the same facts (Rec. 164-5) and added that the vessel would be covered while laid up in "safe tributary to Puget Sound".

Captain Barneson testified that the language used touches the "character of her employment"; that the vessel would be covered under the policy while laid up in Puget Sound within thirty miles of Seattle and "tributary waters".

> "Q. If it is customary to take vessels into those parts of the tide flats which are navigable, you would consider that your vessel was within the waters described here would you not?
>
> A. Yes, sir, I would consider she was within those waters, if they were navigable waters (Rec. 172).
>
> Q. It is customary in the insurance trade to hold a vessel covered while laid up under a yearly policy, is it not?

A. Yes, sir, that is my experience. The warranty touches the character of the employment. It is special" (p. 29).

Q. If you are at that point where the waters of the river flow into a tributary of Puget Sound, say Elliott Bay, you would not consider you were beyond those waters?

A. I would consider that you are beyond the waters of Puget Sound *just as soon as you went beyond the rise and fall of the tide, outside of the salt water"* (Rec. 174).

Alexander testified (Rec. 176) that the use of the word "employed" without the additional words "to be", "is merely a *grammatical error to which many people are subject in expressing themselves".*

From the testimony of these witnesses, these conclusions are inevitable:

1st: That the words "warranted employed in freighting, etc.," simply "restrict the vessel while being operated to the waters described in the policies, and in this case to the waters within a radius of thirty miles of Seattle".

2nd: That the insured vessel is not required under this language to be kept in constant operation during the life of the policy, but no return premium being demanded, may be laid up within thirty miles of Seattle in Puget Sound or tributaries

within the ebb and flow of the tide, if the place selected is a usual and customary one.

3rd: That there is no basis whatever for appellant's claim that these witnesses testify that: The vessel *will be* employed as indicated *during the life of the policy.*

We accordingly insist that the trial court's interpretation of the contract is absolutely correct. We were not responsible for the "grammatical error" referred to by Alexander. These covenants, as suggested by Judge Hanford, are always construed favorably to the assured. We had a right to assume there was no grammatical error and that the words simply implied that the vessel was, when the policies were issued, employed in freighting, etc. That such is a correct construction of the language is also irresistible in the light of the conceded facts that the words "employed, etc., within a radius of thirty miles of Seattle" had reference to the place of her employment under the policy during its life.

This defense is likewise purely technical and of no avail.

It is next contended that if the words "warranted employed, etc.," meant that the vessel must be continuously employed, were the policies breached by her laying in the tidal waters of the Duwamish River?

The Vashon was laid up for the winter near the mouth of the Duwamish River and at a usual place for that purpose. She was laid up by a competent navigator and moored with extreme care.

See evidence of Warner and diagram attached to affidavit of Warner.

Was the Duwamish River at a place where there was a ten foot rise and fall of the tide a tributary of Puget Sound? The insured vessel was permitted to use the navigable waters of Puget Sound within a radius of thirty miles of Seattle.

In *The Orient,* 16 Fed., which was affirmed by the Supreme Court, it was held that a policy permitting a vessel to navigate the Atlantic Ocean between Europe and America, was covered while in the Gulf of Mexico.

Witnesses agree that the Vashon could be laid up within a radius of thirty miles of Seattle and she would be covered. That she could have been moored at the head of Elliott Bay, where she would

have been buffeted by gales cannot be disputed. She was moored in thirty feet of water in the tidal waters near the mouth of Duwamish River, at a usual protected mooring and within the city limits of Seattle.

Counsel cites the *Hastorf* case, 132 Fed. The policy provided, "Warranted by the assured *to be* employed *exclusively* in the freighting business and to navigate only the waters of the Bay and Harbor of New York, the North and East Rivers and the inland waters of New Jersey".

The vessel was removed from the *restricted* zone of permitted operations and moored,—not in North or East Rivers, but in Rondant Creek a tributary of the Hudson, where by the very terms of the policy she had no right to be laid up.

In *Miller vs. Insurance Company,* 12 W. Va. 116, 29 Am. Rep. 452, the policy gave the insured permission to navigate the Mississippi River and tributaries, except the Missouri and Arkansas Rivers. The insured vessel was lost in a tributary of the Red River, which was a tributary of the Mississippi, and the court held the policy covered the loss.

A tributary is a body of water which runs or empties into a larger body of water. Elliott Bay

is tributary to Puget Sound. The same tide that would float the Vashon in safety off the end of Harbor Island, would enable her to float and navigate at the place where she was moored.

Appellant's witnesses say the vessel could be laid up under the policy in a tributary of Puget Sound at a usual and cusotmary place; and had the vessel been anchored in the open Bay off Harbor Island in the winter season and there lost, these Insurance Companies would be now contending they were not liable for the reason that such place was neither "usual" nor safe.

In the *Pearson* case a vessel was insured while lying in the Victoria Docks, which was protected against loss by fire by adequate appliances, with leave to go into dry dock. She went into dry dock, but instead of returning to Victoria Dock where there was adequate fire protection, she anchored in the Thames and was burned.

The question of partial loss, we insist, is not involved in this case. At the time the Vashon was hauled out, cleaned and inspected, expenses had been incurred amounting to the sum of $3,964.80.

The bids submitted for the repair of the vessel were respectively $14,027.00, time required four months, and $23,500.00, time required sixty days. The vessel was sold, after due notice to all parties, for $750.00. Any amount recieved from the sale of the vessel would be properly applied, first, to the payment of the expenses incurred by the surveyors in raising, hauling out, cleaning and surveying the vessel. And after applying the purchase price, there would have been left an indebtedness in excess of $3,000. Further than that, in order to secure a premise on which to base an argument for partial loss, proctor for appellant has taken the proposal for the repair of the vessel, which would require four months' time within which to complete the work, during which time the vessel would necessarily remain in a condition to be of no value to the appellee.

We respectfully submit that the decree of the trial court should be in all respects by this court affirmed.

KERR & McCORD,
IRA A. CAMPBELL,
Proctors for Appellees.

No. 2383

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation, Claimant of the American Steamship "BEAVER," Her Engines, etc.,

Appellant,

vs.

PORTLAND AND ASIATIC STEAMSHIP COMPANY, a Corporation,

Appellee.

Apostles.

Upon Appeal from the United States District Court for the Northern District of California, First Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND & ASIATIC STEAMSHIP COMPANY, a Corporation,

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Respondent.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this case on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following:

I.

Statement required by Admiralty Rule IV, Subdivision I of said *Circuit of* Appeals.

II.

The stipulation permitting use of record in the case of Lie vs. Beaver, filed February 5th, 1914.

III.

The final decree and the notice of appeal.

IV.

The Assignment of Errors.

V.

This Praecipe.

Dated: February 9th, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
DENMAN & ARNOLD,
Proctors for Respondent and Appellant. **[2*]**

[Endorsed]: Filed Feb. 10, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[3]**

Statement of Clerk U. S. District Court.

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND AND ASIATIC STEAMSHIP COMPANY, a Corporation,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Respondent.

PARTIES.

LIBELANT: The Portland and Asiatic Steamship Company, a Corporation.

RESPONDENT: The San Francisco and Portland Steamship Company, a Corporation. [4]

*Page number appearing at foot of page of original certified Record.

PROCTORS.

For LIBELANT: Messrs E. B. McClanahan and S. H. Derby, San Francisco, California.

For RESPONDENT: Messrs. William Denman and G. S. Arnold, and Messrs. McCutchen, Olney and Willard (Ira A. Campbell, Esquire, representing the firm of McCutchen, Olney and Willard), all of San Francisco, California.

PROCEEDINGS.

1911.

March 30. Filed Libel for damages, etc.

Issued Citation for the appearance of Respondents, and which said Citation was afterwards returned and filed on March 30th, 1911, with the return of the United States Marshal for the Northern District of California, endorsed thereon as follows:

"I have served this Writ personally by copy on San Francisco and Portland Steamship Company, a corporation, by handing to and leaving a copy hereof with A. J. Frey, who is the person designated by the said San Francisco and Portland Steamship Company, a corporation, under the statutes of the State of California, as the person upon whom all legal process shall be served [5] in matters affecting the said San Francisco and Portland Steamship

Company, a corporation, in the State of California, this 30th day of March, 1911, in the City and County of San Francisco, in the State and Northern District of California.

C. T. ELLIOTT,
U. S. Marshal.
By B. F. Towle,
Office Deputy Marshal."

May 12. An order was this day entered by the District Court of the United States for the Northern District of California, that the above-entitled cause and the cause entitled Olaf Lie, Master of the Norwegian Steamship "Selja," etc., vs. The American Steamship "Beaver," etc., and numbered 15,099, be consolidated for trial, etc. (copy of said order is embodied in this Transcript).

Under said Order of Reference all entries as to hearings, references to Commissioners, etc., are entered in the latter cause, and no other reference thereto is herein made, as per the instructions of Proctors for Appellant, herein.

May 17. Filed Answer of Respondent to the Libel herein.

1912.

April 23. Filed Stipulation as to Amending Original Libel herein.

23. Filed Amendment to Libel.

1913.

December 5. Filed Final Decree.

1914.

February 5. Filed Notice of Appeal.

February 10. Filed Assignment of Errors. [6]

At a stated term of the District Court of the United States for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 12th day of May, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable JOHN J. DE HAVEN, Judge.

#15,099.

OLAF LIE, Master, etc.

vs.

The American Str. "BEAVER," etc.

#15,130.

PORTLAND & ASIATIC STEAMSHIP COMPANY

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY.

Order Consolidating Causes [and Referring Same to U. S. Commissioner to Take Evidence, etc.].

The motion to consolidate these causes for trial

and for an order of reference, this day came on for hearing and after hearing E. B. McClanahan, Esqr., in behalf of said motion and other proctors in opposition thereto, by the Court ordered that said cause be, and they are hereby consolidated for trial, and said causes as consolidated be, and they are hereby referred to Jas. P. Brown, United States Commissioner, to take the evidence to be offered by the respective parties and to report the same to the Court within thirty days from this date. [7]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND AND ASIATIC STEAMSHIP COMPANY,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Respondent.

Final Decree.

The above cause having come duly on to be heard on the pleadings and proofs of the respective parties, and the same having been argued and submitted, and an opinion having been filed herein on the 25th day of November, 1913, finding that libelant is entitled to damages from respondent in the sum of $13,951.26, together with interest thereon at the rate of six per

cent per annum from November 22d, 1910; now, therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said libelant do have and recover of the San Francisco and Portland Steamship Company, respondent herein, the sum of Thirteen Thousand Nine Hundred and Fifty-one and 26/100 Dollars ($13,951.26), together with interest thereon at the rate of six per cent per annum from November 22d, 1910, to date, amounting to the sum of Two Thousand Five Hundred and Thirty-four and 36/100 Dollars ($2,534.36), making a total of Sixteen Thousand Four Hundred and Eighty-five and 72/100 Dollars ($16,485.72), and that said respondent pay to said libelant the said sum of Sixteen Thousand Four Hundred and Eighty-five and 72/100 Dollars ($16,-485.72), together with interest thereon at the rate [8] of six per cent per annum from the date of this decree until the same is satisfied, together with costs to be taxed herein.

Dated: December 2d, 1913.

R. S. BEAN,

Judge (by Assignment) of the United States District Court for the Northern District of California.

O. K. as to form.

McCUTCHEN, OLNEY & WILLARD.

[Endorsed]: Filed Dec. 5, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [9]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND AND ASIATIC STEAMSHIP COMPANY,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Respondent.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to the Libellant, and Messrs. McClanahan & Derby, Its Proctors:

You and each of you will please hereby take notice that the San Francisco and Portland Steamship Company, a corporation, claimant and respondent herein, hereby appeals from the final decree made and entered herein on the 5th day of December, 1913, to the next United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit, at the City and County of San Francisco.

Dated, February 5th, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
DENMAN & ARNOLD,
Proctors for Claimant and Appellant. [10]

Service of the within Notice of Appeal and receipt

of a copy is hereby admitted this 5th day of February, 1914.

McCLANAHAN & DERBY,
Proctors for Libelant.

[Endorsed]: Filed Feb. 5, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND & ASIATIC STEAMSHIP COMPANY, a Corporation,

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Respondent.

Assignment of Errors.

Now comes San Francisco & Portland Steamship Company, a corporation, owner of the American steamship "Beaver," her engines, etc., claimant, respondent and appellant herein and says:

That in the record, opinions, decisions, interlocutory and final decrees and proceedings in said cause, there is manifest and material error, and said appellant now makes and files and presents the following Assignment of Errors on which it relies, to wit:

I.

That the District Court erred in holding and de-

creeing that libelant was entitled to recover from claimant and respondent, as set forth in the decree filed herein on the 5th day of December, 1913.

II.

That the District Court erred in holding and decreeing that libelant was entitled to recover damages in full for the loss of bill of lading freight, bunker coal, flour slings, house flag, dunnage mats and wood.

III.

That the District Court erred in holding and decreeing that libelant was entitled to recover damages in full, without any offset [12] whatever.

IV.

That the District Court erred in not holding and decreeing that the damages occasioned by the collision, should be divided.

V.

That the District Court erred in not holding that the libelant herein was in the same position with reference to damages occasioned by the collision as the owners of the "Selja."

VI.

That the District Court erred in holding that libelant was entitled to a judgment for its costs and in not holding that said costs should be divided.

Dated: February 9th, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
DENMAN & ARNOLD,
Proctors for Respondent and Appellant. [13]

Service of the within Assignment of Errors and

receipt of a copy is hereby admitted this 9th day of February, 1914.

McCLANAHAN & DERBY,
Proctors for Libelant.

[Endorsed]: Filed Feb. 10, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,130.

PORTLAND AND ASIATIC STEAMSHIP COMPANY,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Respondent.

Stipulation Permitting Use of Record on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the appeal of the claimant and respondent herein may be heard and determined upon the record on file in the United States Circuit Court of Appeals for the Ninth Circuit in the case of Olaf Lie, Master of the Norwegian Steamship "Selja," vs. San Francisco and Portland Steamship Company, a Corporation, Claimant of the American Steamship "Beaver," and numbered therein 2365.

It is further stipulated that a supplemental record

of the proceedings in the case numbered 15,130 of the records in the United States District Court for the Northern District of California, First Division, may be prepared and filed in the said United States Circuit Court of Appeals and that said appeal may be placed upon the calendar of said Court for argument on the day designated for hearing the appeal in said case numbered 2365, to wit: March 9th, 1914.

McCLANAHAN & DERBY,
Proctors for Libelant.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
DENMAN & ARNOLD,
Proctors for Claimant and Respondent.

[Endorsed]: Filed Feb. 5, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

United States of America,
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing and hereunto annexed (14) fourteen pages, numbered from 1 to 14, inclusive, contain a full, true and correct copy of certain documents and records as the same now appear on file and of record in the clerk's office of said District Court, in the cause entitled Portland & Asiatic Steamship Company, a Corporation, Libelant, vs. San Francisco & Portland Steamship Company, a Corporation, Respondent, numbered 15,130.

Said Transcript is made up pursuant to and in accordance with the "Praecipe for Apostles on Appeal" (copy of which is embodied herein), and the instructions of Messrs. McCutchen, Olney & Willard and Ira A. Campbell et al., Proctors for Respondent and Libelant herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Appeal is the sum of $4.90, and that the same has been paid to me by the proctors for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of February, A. D. 1914.

[Seal] W. B. MALING,
Clerk.
By Lyle S. Morris,
Deputy Clerk. [16]

[Endorsed]: No. 2383. United States Circuit Court of Appeals for the Ninth Circuit. San Francisco and Portland Steamship Company, a Corporation, Claimant of the American Steamship "Beaver," Her Engines, Etc., Appellant, vs. Portland and Asiatic Steamship Company, a Corporation, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed February 24, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Meredith Sawyer,
Deputy Clerk.

[Stipulation That Appeal Herein may be Heard and Determined on Record in Olaf Lie vs. S. F. & Portland S. S. Co., No. 2365, etc.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Appellant,

vs.

PORTLAND AND ASIATIC STEAMSHIP COMPANY,

Appellee.

STIPULATION PERMITTING USE OF RECORD ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the appeal of the claimant and appellant herein may be heard and determined upon the record on file in the United States Circuit Court of Appeals for the Ninth Circuit in the case of Olaf Lie, Master of the Norwegian Steamship "Selja," vs. San Francisco and Portland Steamship Company, a Corporation, Claimant, of the American Steamship "Beaver," and numbered therein 2365.

It is further stipulated that a supplemental record of the proceedings in the case numbered 15,130 of the records in the United States District Court for the Northern District of California, First Division, may be prepared and filed in the said United States Circuit Court of Appeals and that said appeal may

be placed upon the calendar of said Court for argument on the day designated for hearing the appeal in said case numbered 2365, to wit: March 9th, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
DENMAN & ARNOLD,
Appellant.

E. B. McCLANAHAN,
S. H. DERBY,
Appellee.

[Endorsed]: No. 2383. United States Circuit Court of Appeals, for the Ninth Circuit. San Francisco and Portland Steamship Company, Appellant, vs. Portland and Asiatic Steamship Company, Appellee. Stipulation Permitting Use of Record on Appeal. Filed Feb. 24, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twenty-fourth day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable FRANK S. DIETRICH, District Judge.

No. 2383.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation, Claimant of the American Steamship "BEAVER," Her Engines, etc.,

Appellant,

vs.

PORTLAND AND ASIATIC STEAMSHIP COMPANY, a Corporation,

Appellee.

Order Allowing Appeal to be Heard and Determined on Record in Olaf Lie vs. S. F. & Portland S. S. Co., No. 2365, Allowing Supplemental Record to be Filed, and Assigning Cause for Argument on March 9, 1914.

Pursuant to the stipulation of counsel, this day filed therefor, it is ORDERED that the appeal in the above-entitled cause may be heard and determined upon the record on file in this court in the cause entitled Olaf Lie, Master of the Norwegian Steamship "Selja," etc., Appellant, vs. San Francisco & Portland Steamship Company, a Corporation, Claimant of the American Steamship "Beaver," Her Engines, etc., No. 2365; and that a Supplemental Record of the proceedings had in the first above-entitled cause (No. 15,130 in the court below), may be prepared and filed in this court, and that the appeal herein may be placed upon the calendar of this court for argument on March 9, 1914, the day on which the appeal in the foregoing entitled cause of Olaf Lie, Master, etc., vs. San Francisco & Portland Steamship Co., Claimant, etc., No. 2365, is set for argument.

No. 2383

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

San Francisco and Portland Steamship Company (a corporation), claimant of the American Steamship "Beaver", her engines, etc.,

Appellant,

vs.

Portland and Asiatic Steamship Company (a corporation),

Appellee.

BRIEF OF APPELLANT.

Statement of the Case.

On the 22nd day of November, 1910, the American Steamship "Beaver", owned by appellant, while proceeding on a voyage from San Francisco to Portland, ran into and sank the Norwegian Steamship "Selja", at a point in the vicinity of Point Reyes, California, and, as a result of the collision, the "Selja", together with all of her equipment and cargo, became a total loss. The question of liability for the loss of the "Selja" is now pending before this Court, in cause No. 2365, on an

appeal from the decision of District Judge Bean, sitting by assignment as judge of the United States District Court, for the Northern District of California, in which the Court held the "Selja" to be in fault. Inasmuch as the fault of the "Beaver" was admitted, the damages, so far as concerned the two vessels, were accordingly divided under the rule of cross liability.

The libel in this cause was filed against the "Beaver" by appellee, as the time charterer of the "Selja", for damages suffered by appellee, as such charterer, through loss of its bill of lading freight on the "Selja's" cargo, and for the value of the bunker coal, flour slings, house flag and dunnage wood and mats, belonging to appellee, which went down with the "Selja". The cause was consolidated for trial with the libel brought against the "Beaver" by Olaf Lie, master of the "Selja", on behalf of himself and the owners, officers and crew of said steamship, being Cause No. 15099 in the District Court, and Cause No. 2365 now pending in this Court. Following the hearing of said cause, Judge Bean rendered his decision, holding the "Selja" mutually in fault with the "Beaver". Thereafter separate decrees were entered in the consolidated actions.

In the present action the Court held that the appellee had a right of full recovery, unaffected by said cross liability, against appellant, as claimant of the "Beaver", for said bill of lading freight, and said bunker coal, flour slings, house flag and dunnage wood and mats. Final decree was accordingly entered awarding appellee the sum of $13,951.26, with interest thereon at the rate of 6% per annum from November 22, 1910, to date of

entry, amounting to $2,534.36, or a total award of $16,485.72 (Apostles pp. 6-7). Of said sum of $13,951.26, $10,742.21 was on account of the bill of lading freight, and $3,209.05 as the value of the bunker coal, flour sling, house flag and dunnage wood and mats. The correctness of the amount of damages is admitted, and this appeal involves alone the question of liability therefor.

It is admitted that on February 1, 1909, the owner of the "Selja" chartered her to appellee for a period of three years, under a charterparty which was not a demise of the vessel, but a contract of affreightment for the carriage of merchandise and livestock and passengers; that appellee procured to be shipped on board the "Selja" various goods, wares and merchandise, and gave bills of lading therefor on which the total freight which would have been collected by appellee upon delivery of the goods, less certain expenses in earning said freight saved by the collision, would have amounted to the aforesaid sum of $10,742.21.

It is further admitted that bunker coal was furnished the "Selja" for steaming purposes by appellee under the requirements of the charterparty, and that the flour slings were furnished the vessel by appellee for loading and discharging the cargo, and the dunnage woods and mats for properly stowing the same.

The question presented by this appeal is whether appellee is entitled to a full recovery for the loss of said bill of lading freight and the value of said bunker coal, etc., or whether, as such charterer, it is affected by the fault of the "Selja" and only entitled to recover subject to the rule of cross liability, by reason of such fault.

Appellant contends that the damages suffered by appellee should have been divided, and that appellant should be entitled to offset against the moiety recoverable by appellee, one-half of the damages awarded the owners of the cargo against appellant, in that certain cause in the District Court No. 15099, also consolidated for trial with the cause herein referred to.

Inasmuch as the amount awarded the owners of the cargo against appellee was more than twice the damages suffered by the owner of the "Selja" and appellee, appellee will recover nothing if appellant's contention is upheld and the rule of cross liability is applied in this action.

Specifications of Error.

Errors have been assigned, in the Apostles on Appeal, to the decree of the District Court, as follows:

I.

That the District Court erred in holding and decreeing that libelant was entitled to recover from claimant and respondent, as set forth in the decree filed herein on the 5th day of December, 1913.

II.

That the District Court erred in holding and decreeing that libelant was entitled to recover damages in full for the loss of bill of lading freight, bunker coal, flour slings, house flag, dunnage mats and wood.

III.

That the District Court erred in holding and decreeing that libelant was entitled to recover damages in full, without any offset whatever.

IV.

That the District Court erred in not holding and decreeing that the damages occasioned by the collision, should be divided.

V.

That the District Court erred in not holding that the libelant herein was in the same position with reference to damages occasioned by the collision as the owners of the "Selja".

VI.

That the District Court erred in holding that libelant was entitled to a judgment for its costs and in not holding that said costs should be divided.

Argument.

I.

THE "SELJA" WAS MUTUALLY IN FAULT WITH THE "BEAVER".

By stipulation of the parties hereto and by order of this Court entered pursuant to such stipulation, this appeal is to be heard and determined upon the record on file in this Court in the cause entitled, Olaf Lie, Master of the Norwegian Steamship "Selja", etc., Appellant, v. San Francisco and Portland Steamship Com-

pany, a corporation, claimant of the American Steamship "Beaver", her engines, etc., No. 2365.

Inasmuch as the question of the fault of the "Selja" has been fully presented both on argument and by briefs in said Cause No. 2365, by the same proctors who appear for the respective parties to this appeal, we shall not reiterate at length the contentions presented by appellant, appellee in Cause No. 2365, as to the "Selja's" mutual fault for said collision. We respectfully submit, however, that on the record, briefs and arguments in said Cause No. 2365, the fault of the "Selja" for said collision is clearly established, and that it should be so found in this cause, and the decision of the District Court upheld in that respect.

II.

THE RIGHT OF APPELLEE TO RECOVER FOR ITS LOSSES DUE TO THE COLLISION WAS AFFECTED BY THE FAULT OF THE "BEAVER", AND RECOVERY SHOULD BE AWARDED UNDER THE CROSS LIABILITY RULE.

Bill of Lading Freight.

The interest of appellee was not in the cargo itself, or with the cargo owner, but in the right to collect from the cargo owner a certain compensation—freight—for the transportation and proper delivery of the cargo. The agency by which this freight would have been earned, but for the collision, was the "Selja", which was mutually in fault with the "Beaver" for the collision.

Possessing, as ships do in the law of the admiralty, a personality, for a ship is as much a party to an action *in rem* as the owner to an action *in personam,* the negligence of the "Selja" was as much a legal fact as that of her master in his negligent direction of her navigation. Had she survived the collision, she would have been libelled and condemned, in accordance with the decision of the Court, with all the attributes, in the eye of the law, of a person. So that, it is very properly said that the "Selja" was the agency of the charterer in its earning of the bill of lading freight, and her negligence thus affects the charterer's rights to that freight just as it does the owner's right to charter hire. In both cases, the ship was the instrumentality through which that which had been lost—freight and hire—would have been earned but for its contributing negligence. The ship thus being negligent, and such negligence contributing to the collision, the charterer's right of recovery is thereby justly brought within the operation of the mutual fault rule.

If the "Selja" was in fault, it was because of the negligence of her master in her navigation. We believe, therefore, that appellee will concede that even if the negligence of the vessel, *per se,* does not affect the right of appellee as charterer to recover for its losses, that of the master does, if he can be said to have been the agent of the charterer.

It is submitted that the master was the agent of the charterer, appellee, in respect to the only interest of the latter which had been damaged by the collision. All that appellee had, or has been deprived of, was a con-

tract to carry the goods, which contract, if completed, would have yielded it a certain freight. To earn the freight appellee was required, *ex necessitate,* to utilize the services of the master in the navigation of the "Selja". The successful performance of that act by the master was the condition precedent to the earning of the interest which was destroyed by the negligent act of the very person through whom it was being earned. This agency of the master, for freight earning purposes, finds express recognition in the provisions of the charter-party.

By its terms, the master was to prosecute his voyage with the utmost despatch and render all customary assistance with the ship's crew, tackle and boats, and at the time of the collision he was actually navigating the "Selja" on a voyage directed by the charterer. The master and officers, though appointed by the owner, were to be solely under the jurisdiction, orders and directions of the charterer as regards employment, agency and other arrangements, and were faithfully to carry out all orders of the charterer in regard to the handling of cargo, as though they received such instructions from the owner. And the charterer, on the other hand, was to indemnify the owner from the consequences or liabilities that might arise from the master signing bills of lading, or otherwise complying with the same. Nothing could be plainer from such provisions than that the master of the "Selja' was, so far as concerned her use, as an instrumentality of the appellee for the earning of the bill of lading freight, an agent of the latter.

Whether, therefore, the navigation of the "Selja"' be viewed as the act of the instrumentality or agency by which appellee was earning its freight, or as the resultant of the negligent direction of her master, the negligence on the part of the "Selja" which contributed to the collision, so far as the "Beaver" was concerned, was the negligence of appellee, and should limit its recovery of bill of lading freight, as against the appellant, to a mutual fault basis.

Bunker Coal, Slings, etc.

Nor is appellee entitled to full recovery for bunker coal, flour slings, house flag, and dunnage wood and mats. These were material parts of the ship's equipment used in the handling and transportation of her cargo and navigation of the vessel to earn the charter hire and bill of lading freight. It is impossible to conceive of a claim for damages more remote than that of a charterer, whose coal furnished the motive power of a negligently navigated vessel, in asking the separation of the coal from the vessel, so as to relieve the coal from the condemnation meted out to the vessel for negligent navigation made possible only through the use of the coal. But for the coal, as well as the negligence in navigation, the collision would never have occurred.

It is submitted that the coal, flour slings, house flag, and dunnage wood and mats became so integral a part of the "Selja" that it is impossible to now dissect her and her equipment, and say that this part was in fault and that was not, as against the "Beaver". Having become a part of the "Selja" to make her a seaworthy vessel and her voyage possible, a right of recovery for

those items must stand in the same position as the vessel, condemned in mutual fault.

Respectfully submitted,

WILLIAM DENMAN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

No. 2383

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY (a corporation),
Appellant,

vs.

PORTLAND AND ASIATIC STEAMSHIP COMPANY (a corporation),
Appellee.

BRIEF FOR APPELLEE.

Although the facts in the above case are set out with substantial correctness in appellant's brief, the amount involved is quite large and we prefer to go a little more into detail so that the court may have a more thorough understanding of the matter. We would also like to correct the statement of appellant that this suit was brought against the "Beaver", since it was a suit in personam against the owners of the "Beaver", and the statement in the caption on appeal is a mistake. The case was, however, consolidated for trial with the other suits against the "Beaver", and it was stipulated on appeal that it might be heard and determined on

the same record and a short supplemental record containing the final decree and the appeal papers. The pleadings in the case will be found in Volume IV of the main record in Case No. 2365, pp. 1455-1473; certain stipulated facts on pages 1410-1423, and the opinion of the court on pages 1431-1432. The final decree will be found on pages 6-7 of the supplemental record.

The appellee in this case was the time charterer of the "Selja" and its libel (IV, pp. 1465-1473) may be briefly summarized as follows:

1. Alleges the corporate existence of the parties and appellant's ownership of the "Beaver".

2. That on February 1st, 1909, the owners of the "Selja" chartered her to the libelant for three years and that she was proceeding under said charter at the time of the collision in question. Also that "said " charter party was not a demise of the vessel, but was " a mere contract of affreightment for the carriage of " merchandise and live stock and passengers by the " libelant on board said vessel".

3. That libelant procured to be shipped on board the "Selja" various goods, wares and merchandise and gave bills of lading therefor.

4. "That in and by said bills of lading it was pro- " vided that freight should be paid to libelant for the " carriage aforesaid on said goods, wares and mer- " chandise at certain rates which were the usual and " reasonable rates for the transportation of said goods, " wares and merchandise to said ports of San Fran- " cisco and Portland, and that said freight amounted

" in the aggregate, excluding all prepaid freight, to the " sum of fourteen thousand and eighty-eight and 36/100 " dollars ($14,088.36), and was payable at the said " ports of San Francisco and Portland upon the de- " livery of said goods, wares and merchandise to the " consignees thereof."

5. Sets out the details as to said goods, wares and merchandise.

6. Alleges the total loss of the "Selja", the aforesaid goods, wares and merchandise and the aforesaid freight.

7. Alleges the facts of the collision and the sole fault of the "Beaver", adding, however:

"Libelant further alleges, however, that the freight interest upon which it seeks a recovery in this libel was an innocent one, and that the aforesaid steamship 'Beaver' is responsible for the loss of said freight irrespective of the question whether the aforesaid steamship 'Selja' was partly in fault or not".

8. Alleges the total loss of the aforesaid freight by reason of the collision.

An amendment was by stipulation added to said libel reading as follows:

"VIIIa.

"And libelant further alleges, by way of amendment " to its libel herein, as follows:

"That at the time of said collision libelant had on " board said steamship 'Selja' and was the owner of " the following articles:

"1170 tons of Bunker Coal of the reasonable value " of $2.565 a ton and of the total value of $3,001.05; 30 " flour slings of the reasonable value of $5.00 each and " of the total value of $150.00; one house flag of the " reasonable value of $3.00, and dunnage mats and " wood of the reasonable value of $55.00; all of said " articles being of the total value of $3,209.05."

"That by reason of said collision and the negligence " of those in charge of the steamship 'Beaver' as afore- " said, all of said articles were totally lost, and libelant " has been further damaged by reason of said collision " in said above mentioned amounts, for which it prays " full recovery with interest in addition to its recovery " for freight."

All of the facts set forth in the libel were admitted except the allegations as to the facts concerning the collision, upon which the lower court finally passed by finding both vessels in fault, and also the allegation that libelant's freight interest was an innocent one and, therefore, entitled to recover in full in any event. The appellant did not deny this last allegation but merely alleged ignorance in regard to it.

Upon these facts as so set out and admitted, and upon the additional facts set out in a stipulation entered into between the parties (IV, pp. 1410-1423), depends appellee's right to recover for its lost freight, bunker coal, etc., and the amount of such recovery. It is admitted by the pleadings and in appellant's brief that the value of the bunker coal, flour slings, house flag and dunnage mats and wood was $3,209.05, and that the net

freight after deducting the expenses which would have been incurred to earn the same which were saved by the collision was $10,742.21. Interest was also allowed on these sums from the date of the collision. As the correctness of these amounts is expressly admitted in appellant's brief it will be unnecessary to explain how they were arrived at or to cite cases as to how net freight is to be computed in cases of collision. The only question is, as stated by appellant, that of liability, i. e., whether the damages in question should be allowed without offset or whether, because of the negligence of the "Selja", the appellee should only recover half damages against which appellant could offset one-half of the cargo losses, thus preventing any recovery at all. In other words the question is whether appellee stands in the position of a guilty party like the owner and master of the "Selja" or of an innocent party like the cargo owners and the "Selja's" officers and crew.

Under the pleadings no question is made as to the right of appellee to sue for freight in its character as a charterer, nor is any question in this regard raised in appellant's brief. This right is clearly recognized in the case of *The Okehampton,* XVIII Commercial Cases, Advance Sheets, Part VI, p. 320, but, as no point is made on this subject, we need not discuss it further.

It is also evident that if the "Selja" was not at fault in the collision appellee is entitled to its recovery, and none of the questions argued herein need be discussed. Whether the "Selja" was so in fault will be determined by this court in Case No. 2365 and we agree with appellant that that cause need not be reargued in this.

Argument.

EVEN ASSUMING THAT THE "SELJA" WAS AT FAULT THE RIGHT OF APPELLEE TO RECOVER ITS LOSSES WAS NOT AFFECTED THEREBY AND THE LOWER COURT'S DECISION THAT RECOVERY SHOULD BE ALLOWED WITHOUT OFFSET IS CORRECT.

We will first deal with appellee's right to recover the value of its bunker coal, flour slings, house flag and dunnage mats and wood. Whatever may be said as to the right to recover the bill of lading freight, we submit that the right to recover in full for these items without any offset is clear. The articles in question were personal property which the charterers had on board the "Selja" at the time of the collision, and we submit that they stand in the same position as the cargo, the property of innocent parties. It is admitted by the pleadings and by appellant's brief that the charter party was a mere contract of affreightment and not a demise of the vessel, the charterers having nothing to do with navigating her or causing the collision. The articles lost were the separate and personal property of the charterers and we can see no plausible reason why there should not be a recovery in full for said articles. Counsel would have the coal made responsible for the collision as a personality because it was used to navigate the vessel, but so are officers and crew so used and they were allowed a full recovery in this case. Moreover, the coal for which we are claiming was *not* used to navigate said vessel but was lost before it could be so used. How the coal not used can be charged with negligence we fail to see. If the coal had

been furnished by a cargo owner, surely it would not have been responsible, and why should it be responsible when furnished by a charterer? We also must entirely dissent from the view that bunker coal, flour slings, dunnage mats and wood and a house flag are integral parts of a ship, especially where those articles are furnished by an innocent charterer.

We now come to the question of the recovery of the chartered freight. As already pointed out, and as emphasized in Judge Bean's opinion, the charterer was an innocent party in this case. "The charter was a " mere contract of affreightment, the vessel remaining " in the possession, control and command of the owner " so far as her navigation was concerned. Her master " and crew were the agents of the owner and not of " the charterer. The charterer had no control over her " navigation, and was in no way responsible for the " negligence which caused the damages." (IV, 1431-1432.)

In *36 Cyc.* 67 it is said:

> "If the charter party lets only the use of the vessel, the owner at the time retaining the command and possession and control over its navigation, the charterer is regarded as a contractor for a designated service, the charter party being a mere contract of affreightment and the duties and responsibilities of the general owner are not changed and the charterer is not clothed with the character or responsibility of ownership."

In *Leary v. United States,* 14 Wall. 607; 20 Law Ed. 756, the court says:

> "In examining the adjudged cases on this subject we find some differences of opinion, especially in

> the earlier cases, as to the effect to be given to certain technical terms used in the charter party in determining whether the instrument parts with the entire possession and control of the vessel, but no difference as to the rule of law applicable when the construction is settled. All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession and control is incompatible with the existence at the same time of such special ownership in the charterer."

In the case at bar the charterers had no such command, possession and control over the ship, but she was in the command, possession and control of the owners. She was the instrument of the owners and not of the charterers. Had she run into another vessel and not herself been lost, the owners and not the charterers would have been responsible. And if the charterers would not be so responsible, how is it possible that they can be charged with negligence so as to defeat their recovery? The provision that the master and officers are to be under the orders and directions of the charterer as regards employment, agency and other arrangements, on which so much stress is laid, is a provision found in practically all modern time charters.

See

Scrutton on Charter Parties, 5 ed., p. 350;
Carver on Carriage by Sea, 4 ed., p. 893.

It simply means that the charterers shall determine what voyages are to be made, what agents are to be

appointed at the ports of loading and discharge and other similar questions. So also as to the bill of lading clause (same citations). This simply protects the master if he signs bills of lading presented by the charterer in case such bills of lading are in fact incorrect, and also protects the owners if the obligations of the charter are increased by the bills of lading. The transportation of the goods, however, by the ship and master is as agent for the owners and not as the agent for the charterer.

See

Carver, §§ 156, 161a.

In § 156 the learned author says:

> "In effect, then, the contract is with the shipowner; and the master should be regarded as having made it on his behalf, and not on behalf of the charterer. And this is the more consistent view. For if the master is agent for the charterers in giving the bills of lading, his agency ceases at that point; in carrying out the contract he clearly acts as servant of the owner."

These provisions relied on by counsel have been repeatedly passed on in recent cases, which exonerated charterers from responsibility for collisions.

See

The Volund, 181 Fed. 643, 665-6, and cases there cited;

Luckenbach v. Insular Line, 186 Fed. 327.

The charters in both of these cases contained the provisions relied on by counsel. In the first of them the ship was being navigated at the time of the collision by

a supercargo appointed by the charterer. The court says in part at p. 666:

> "Nor can we assent to the proposition, which is earnestly contended for, that under charter parties of this sort there is some joint, two-headed navigation of the vessel which will put both parties in control. The provisions (clauses 8, 10) that the captain shall be under the orders and direction of the charterers as regards employment and other arrangements merely authorize the charterer to designate the safe port, and the berth therein to which the ship shall proceed. How she shall be navigated to get there is a matter entirely within the owner's hands."

In the second case cited the vessel was being towed to her berth by tugs employed by the charterer, yet her navigation was still held to be in charge of the owners. These cases are cited not only to show that the provisions of the charter party relied on by appellant have no bearing on the case, but also to demonstrate the absolute innocence of the charterers.

The main fact, however, admitted by the pleadings and borne out by the charter party itself, is that said charter party was a mere contract of affreightment and not a demise of the vessel. As regards the navigation of the ship, the owners were in complete control, the master was their servant and they were responsible for such navigation. The owners by the charter party simply agreed to ship such goods as the charterer put on board to and from such places as the charterer should direct. The ship was their ship and not that of the charterer. In a sense the ship was the agency by which the freight was earned, but so also the ship was

the agency by which the cargo was carried. The question is not what agency the cargo owner or the charterer employs, whether to transport the goods of the one or earn the freight of the other; but whether the cargo owner and the charterer are innocent parties and suffer a loss through the negligence of another over whom they have no control. It is also quite true that the charterer had to utilize the services of the master in the navigation of the "Selja", but so also would a cargo owner have to utilize such services to have his cargo transported. The master did not thereby become the agent of the charterer in navigating the vessel, as the cases above cited show. There was no "joint, two-headed navigation".

Several analogies may also prove helpful in this case. Prior to the decision in the case of *The Hamilton,* 207 U. S. 398; 52 Law Ed. 264, 270, officers and crews of vessels mutually in fault were held to be affected by the negligence of their own ship, and hence were limited to half damages although without offset (*7 Cyc.,* 382). This rule, however, was overturned in that case and it was held that officers and crews, to whom no personal negligence could be charged, could recover in full despite the fact that their own vessel was in fault, and in the case at bar such full recovery was allowed to the officers and crew of the "Selja". And if this be the law, why should not the innocent charterer stand on the same footing? Counsel's argument that the freight is distinct from the charterer, and should be affected by the negligence of the vessel earning it, would apply equally to the recovery by the of-

ficers and crew of the "Selja", and such argument is thus shown to be a specious one.

Another illustration may prove helpful. When cargo is lost the cargo owner is allowed to add to its cost all prepaid freight (*The Scotland,* 105 U. S. 24), and it will not be disputed that all prepaid freight was allowed to the cargo owners in the cases at bar. Yet, if counsel's contention be sound, prepaid freight should not be allowed because it is earned through the agency of the ship and her master. But the law does allow it and, if the innocent cargo owner recovers his prepaid freight, why should not the equally innocent charterer recover his collectible freight? Had the freight in the case at bar been entirely prepaid the "Beaver" would have been liable for all of it as a part of the damages recoverable by the cargo owners. Why should there be a different rule as to the responsibility of the "Beaver" when the freight is not fully prepaid? Surely whether the freight can be recovered from a vessel which is at fault cannot depend upon whether the freight has been prepaid or not, or upon whether it is the innocent cargo owner or the equally innocent charterer who is seeking recovery. That the "Beaver" is liable to the charterer for the loss of freight is not disputed. The only question is whether the owner of the "Beaver" can offset its damages against the charterer's claim, but every right of setoff necessarily presupposes a right of action against the other party. Had the charterer suffered no loss of freight, as, for example, if the freight had all been prepaid, it would hardly be contended that the owner of the "Beaver" would have

any right of action against the charterer. It follows, therefore, that the owner of the "Beaver" has no right of setoff against the charterer, and hence a full recovery of freight must be allowed.

There is apparently, as pointed out by the lower court, a dearth of authorities bearing squarely on the question here involved, but the case of *In re Lakeland Transportation Co.,* 103 Fed. 328, 336, would seem to be somewhat in point. In that case the owners of one of the two offending vessels sued as trustees for the charterers as well as others, just as Captain Lie in Case No. 2365 sued for his owners, officers and crew. The point was made that the charterers and not the owners were the proper parties to sue for this freight, and on this subject the court uses the following significant language:

> "Libelants made claim for loss of freight on the Florida's cargo pending at the time of the collision, viz. the sum of $1,283.05. The Florida was running under charter to the Lackawanna Transportation Company. The libel enumerates as one of the elements of libelants' damages arising out of the collision the loss of this freight. No objection was made before the commissioner as to libelants' right to recover this sum as trustees for the charterer, nor was any exception filed to the allowance of one-half the sum as part of libelants' damage. It is objected here that libelants bear no such relation to the charter as entitled them to sue for this sum, even as trustees, and that suit therefor should have been brought in the name of the charterer. The litigation has apparently proceeded on the theory that the libelants were entitled to prove this item in the capacity of trustees, and its exclusion at this time would deprive the charterer of redress if the

> appraised value of the Roby were sufficient to pay it after satisfaction of prior claims. The question, however, is not important, as the claim of the charterer is inferior to that of the cargo owner, which will absorb the fund. The charterer had possession and control of the vessel, and was owner pro hac vice; and its servant, the master of the Florida, was guilty of fault for which that steamer was condemned. Thorp v. Hammond, 12 Wall. 408-416, 20 L. Ed. 419. The charterer's claim is therefore of the same class as that of the general owners."

We submit that this is a clear intimation that if in that case the charter had been a mere contract of affreightment and not a demise, which made the charterers owners pro hac vice, the charterers would have been allowed a recovery in full without offset. We, therefore, submit that they are entitled to a recovery in full in this case.

It is well settled in the United States that pending freight is recoverable in a collision case (*Spencer on Marine Collisions,* § 202), and that is all that appellee is claiming here although it has also lost a profitable charter. It is true that if there were no charter the owner could only get half damages for the loss of such freight, just as he could only get half damages for cargo losses if he were the owner of the cargo. In a case like that at bar, however, where the charterer and not the owner owns the bill of lading freight, there seems no reason why, as an innocent party, it should not recover its freight in full just as the innocent cargo owner recovers his cargo losses in full and the innocent officers and crew recover their losses. We know of no

case where a party in no way negligent has been barred of his right of recovery in the case of negligence of another, and the general principle that innocent interests should recover in full, as laid down in *The Chattahoochee,* 173 U. S. 540, seems to us the only logical principle to follow in this case.

Any argument that libelant was negligent, based upon the fact that the "Selja" was negligent, has no foundation in fact and can be maintained only in the event that negligence on the part of the charterer is a legal incident to negligence on the part of the ship. The appellant seeks to reach this conclusion by the personification of the "Selja." The courts have frequently treated ships as having a personality, but after all this is merely a fiction and in no case has the application of the fiction been permitted to work injustice. That a fiction will not be extended so as to deprive a party of a recovery, where without fault he has been injured by the negligence of others, is apparent from the language of Mr. Justice Holmes in *The Eugene F. Moran,* 212 U. S. 472. There two tugs and two scows, in tow of one of the tugs, were in collision and all were held to be at fault. It was urged that the tug and its tow should be considered as one unit for the purpose of assessing the damages. The court, however, held that the damages should be equally divided among the four vessels, and said at p. 474:

> "But after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be ex-

> tended. There is a practical line and a difference in degree between a case where the harm is done by the mismanagement of the offending vessel, and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached."

The court might have held that when a ship was negligent everything connected with it was tainted with negligence, and that the right to recover stood upon the same footing as the right of the ship to recover, but our courts early rejected this view and adopted the rule that innocence of fault in fact should be the test. The proposition was laid down in the most general terms in *The Atlas,* 93 U. S. 302, 319, that,

> "*Parties without fault,* such as shippers and consignees, bear no part of the loss in collision suits, and are entitled to full compensation for the damage which they suffer from the wrongdoers, and they may pursue their remedy in personam, either at common law or in the admiralty, against the wrongdoers or any one or more of them, whether they elect to proceed at law or in the admiralty courts." (Italics ours.)

We submit that the decree should be affirmed.

Dated, San Francisco,
August 28, 1914.

Respectfully submitted,
E. B. McClanahan,
S. H. Derby,
Proctors for Appellee.

No. 2385

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife,

Appellants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife, W. A. GRAY and LOIS A. GRAY, His Wife, CHARLES S. FORBES and ADELAIDE F. FORBES, His Wife, FRANK L. HUSTON, JOHN H. PATTEN and DORA W. PATTEN, His Wife, W. W. BARR and GERTRUDE G. BARR, His Wife, and MILWAUKEE LAND COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

No. 2385

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Names and Addresses of Solicitors.

HERBERT S. GRIGGS, Esquire, Fidelity Building, Tacoma, Washington, Solicitor for Appellants.

F. M. DUDLEY, Esquire, White Building, Seattle, Washington, Solicitor for Milwaukee Land Company.

PETERS & POWELL, Esquires, New York Block, Seattle, Washington, Solicitors for W. W. Barr et ux.

W. A. REYNOLDS, Esquire, Chehalis, Washington, Solicitor for Raymond Bray et ux., and W. A. Gray et ux.

MOULTON & SCHWARTZ, Esquires, Portland, Oregon, Solicitors for Chas. S. Forbes et ux., and Frank L. Huston, John H. Patten et ux.

[1*]

In the United States District Court for the Western District of Washington, Western Division.

No. 1696.

W. H. SAWYER AND FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife,

Complainants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife, W. A. GRAY and —— GRAY, His Wife, CHARLES S. FORBES and ADELAIDE F.

*Page-number appearing at foot of page of original certified Record.

FORBES, His Wife, FRANK L. HUSTON, JOHN H. PATTEN, and DORA W. PATTEN, His Wife, W. W. BARR, and —— BARR, His Wife, and MILWAUKEE LAND COMPANY, a Corporation,

Defendants. **[2]**

Stipulation [for Substitution of Executors and Heirs of Alfred C. Tuxbury in Lieu of Alfred C. Tuxbury, Deceased, and Concerning Preparation of Record on Appeal].

1. IT IS STIPULATED between the parties hereto, by their respective counsel, that in view of the death, since the commencement of this action, of Alfred C. Tuxbury, one of the complainants herein, Luna B. Tuxbury and Charles Hill, as executors of the estate of said Alfred C. Tuxbury, deceased, appointed as such by the Orphans' Court of Essex County, State of New Jersey, and Edith E. Tuxbury Hill, Alice Bosworth Tuxbury and Luna Elizabeth Tuxbury be substituted, as the executors of said estate and the heirs of said estate, together with Luna B. Tuxbury, in lieu of and instead of said Alfred C. Tuxbury, deceased, without requiring the probate of the will of said deceased, and the taking out of any ancillary letters of administration in said estate in any court in the State of Washington.

2. IT IS STIPULATED between the parties hereto, by their respective counsel, that service of notice of appeal, bonds on appeal, and all other papers in connection with the appeal, or proposed appeal, to be made by the complainants to the United States Circuit Court of Appeals from the judgment

herein dismissing this cause, etc., together with service of transcript and brief on appeal and all other papers, may be made and all be sufficient as to all of the defendants in error if made upon F. M. Dudley, Esq., as attorney for the defendant Milwaukee Land Company.

3. IT IS FURTHER STIPULATED AND AGREED between the parties hereto that the transcript of record on appeal shall include only the following papers, to wit: **[3]**

1. Summons and third amended bill of complaint.
2. Demurrer to second amended bill of complaint of Milwaukee Land Company and the stipulation providing that said demurrer shall stand as to each and every of the defendants to the third amended bill of complaint.
3. Order sustaining said demurrer.
4. Election of complainants to stand on third amended bill.
5. Judgment of dismissal in favor of defendants.
6. Bill of Exceptions and Order settling the same.
7. Petition for writ of error.
8. Order allowing writ of error.
9. Assignment of errors.
10. Bond on appeal.
11. Writ of error.
12. Citation in error.
13. Praecipe and stipulation for transcript.
14. Stipulation for substitution of executors and heirs of Alfred C. Tuxbury in lieu of said Alfred C. Tuxbury, and order allowing substitution.

4. IT IS FURTHER STIPULATED that the

Clerk in printing the record on appeal may omit from the various papers as above agreed on, the hearing and title of the cause other than a description of the particular paper, and also omit all endorsements on said paper, filing marks, service returns, verifications and receipts, save and except that the heading and title of this stipulation shall be entered in full.

HERBERT S. GRIGGS,
Attorney for Complainants.

F. M. DUDLEY,
Attorney for Milwaukee Land Company.

PETERS & POWELL,
Attorneys for W. W. Barr and Gertrude G. Barr, His Wife.

W. A. REYNOLDS,
Attorney for Raymond S. Gray and Sena Gray, His Wife, W. A. Gray and Lois Gray, His wife.

MOULTON & SCHWARTZ,
Attorney for Charles S. Forbes and Adelaide F. Forbes, His Wife, Frank L. Huston, John H. Patten and Dora W. Patten, His Wife.

(Filed Jan. 7, 1914.) [4]

Stipulation [for Correction of Stipulation for Substitution and for Preparation of Record on Appeal].

IT IS HEREBY STIPULATED AND AGREED between the parties hereto by their respective counsel that Paragraph III of the former stipulation entered into between said parties with respect to substitution of certain parties complainant and the

service of notice of appeal and other papers on appeal upon F. M. Dudley, Esq., be corrected to read as follows:

III.

It is further stipulated and agreed by the parties hereto that the transcript on record on appeal shall include only the following papers, to wit:

1. Summons and Third Amended Bill of Complaint.
2. Demurrer to Second Amended Bill of Complaint of Milwaukee Land Company and the Stipulation providing that said demurrer shall stand as the demurrer of each and every of the defendants to the Third Amended Bill of Complaint.
3. Order sustaining said demurrer.
4. Election of complainants to stand on Third Amended Bill of Complaint.
5. Judgment of dismissal in favor of defendants.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignments of Errors.
9. Bond on Appeal.
10. Citation on Appeal.
11. Praecipe for transcript.
12. The original Stipulation of which this stipulation is amendatory. **[5]**
13. Order Allowing Substitution of Executors and Heirs of Alfred Tuxbury, Deceased.
14. This stipulation.

Second. IT IS FURTHER STIPULATED that the other provisions of the original stipulation, to

wit: Paragraphs I, II and IV, remain in full force.

HERBERT S. GRIGGS,
Attorney for Complainants.
PETERS & POWELL,
Attorney for W. W. Barr and Wife.
W. A. REYNOLDS,
Attorney for Raymond S. Gray and Wife and W. A. Gray and Wife.
MOULTON & SCHWARTZ,
H. D. H.,
Attorney for Frank L. Huston.
MOULTON & SCHWARTZ,
Attorney for John H. Patten and Wife.
F. M. DUDLEY,
Attorney Milwaukee Land Co.

(Filed Feb. 3, 1914.) **[6]**

Third Amended Bill of Complaint.

Complainants for cause of action against the said defendants, and each of them, allege and show to the Court as follows:

I.

That the complainants, W. H. Sawyer and Frances Sawyer, are now, and at all times in this third amended complaint mentioned *are,* husband and wife, and citizens of the United States and residents of the State of Massachusetts; that the complainants, Alfred C. Tuxbury and Luna B. Tuxbury, are now, and at all times in this third amended complaint mentioned were, husband and wife and citizens of the United States and residents of the State of New York.

II.

That the defendants, Raymond S. Gray and Sena Gray, are now, and at all times in this third amended complaint mentioned were, husband and wife and citizens of the United States and residents of the State of Washington; that the defendants, W. A. Gray and Lois Gray, are now, and at all times in this third amended complaint mentioned were, husband and wife and citizens of the United States and residents of the State of Washington; that the defendants, Charles S. Forbes and Adelaide F. Forbes, are now, and at all times in this third amended complaint mentioned were, husband and wife and citizens of the United States and residents of the State of Washington; that the defendant, Frank L. Huston, is, and at all times in this third amended complaint mentioned was, a citizen of the United States and a resident of the State of Oregon; that the defendants, John H. Patten and Dora W. Patten, are now, and at all [7] times in this third amended complaint mentioned were, husband and wife and citizens of the United States and residents of the State of Colorado; that the defendants, W. W. Barr and Gertrude G. Barr, are now, and at all times in this third amended complaint mentioned were, residents of the State of Washington and citizens of the United States; and that defendant, Milwaukee Land Company, is, and at all times in this third amended complaint mentioned was, a corporation organized and existing under the laws of the State of Washington and doing business in the State of Washington.

III.

That on January 25, 1899, the State of Washington made request to the Commissioner of Public Lands for a survey of all public lands in township 11 north, range 4 east, Willamette meridian (including also the public lands in certain other townships not included in this action), all under and pursuant to the provisions of the act of August 18, 1894; that at the time of the making of said request, the west half (W. ½) of section thirty-two (32) of said township 11 north, range 4 east, was a part of the unappropriated unsurveyed public lands of the United States, and as such was duly surveyed and shown upon the plat and survey so requested, and which plat and survey was thereafter duly filed in the United States Land Office at Vancouver, Washington, on April 10, 1901; that thereby and pursuant to the provisions of said Act of August 18, 1894, said State of Washington was allowed a period of sixty days after the filing of said survey and plat, to wit, until June 9, 1901, within which to select from the said unappropriated lands in said township such portions thereof as it desired and within which to file in the said United States Land Office a list of its said selections; that on June 6, 1901, **[8]** the said State of Washington filed in the United States Land Office a list of *of* selections made by it under the provisions of said Act of August 18, 1894; that the said west half (W. ½) of said section 32, township 11 north, range 4 east, was not included in the list so filed by the State of Washington, and was not, nor was any part thereof, selected and appropriated by

the State of Washington within the said limited period of sixty days, or at all.

IV.

That prior to March 29, 1900, F. A. Hyde & Company, a corporation organized and existing under the laws of the State of California, and their grantors had obtained United States Patents to and become the owner of certain land within the limits of the State of California, described as follows: All of section 16, and the west half (W. ½) and the southeast quarter (SE. ¼) of section 36, township 9 north, range 28 west of San Bernardino meridian. That thereafter and prior to said March 29, 1900, the said lands owned by F. A. Hyde & Company, amounting in all to 1120 acres of land, were included within the limits of a public forest reservation established by the President and Congress of the United States and known as Pine Mountain and Zaca Lake Forest Reserve, and the said F. A. Hyde & Company, the owners thereof, under and pursuant to the provisions of the Act of Congress of June 4th, 1897, and other acts of Congress applicable and under and pursuant to the customs, rules and regulations in force and observed by the General Land Office and officials of the Land Department of the United States did relinquish the said tract or tracts amounting to 1120 acres so included in the Pine Mountain and Zaca Lake Forest Reserve; and did duly convey the said lands so relinquished to the Government by deed duly filed for [9] record and recorded in the Public Records of the State of California, and did duly furnish the United States officials with an ab-

stract of title duly authenticated, showing chain of title of land so relinquished from the Government back again to the United States, and that in lieu of the lands so relinquished and on or about March 29th, 1900, said F. A. Hyde & Company did make application for an entry upon the west half (W. ½) of section 33, township 11 north, range 4 east of the Willamette meridian (together with certain other lands, the total amount of lands so selected amounting to 1120 acres in all), all situate in the county of Lewis, State of Washington; that the lands so relinquished, situate in the State of California, had all been patented by the United States and the said F. A. Hyde & Company were the owners thereof under such patents; that the said lands so selected, to wit, the west half (W. ½) of section 32, township 11 north, range 4 east, W. M., was on said March 29, 1900, vacant, nonmineral, public lands, subject to homestead entry, and did not exceed in area the tract covered by the lands so relinquished and surrendered; that the said application was duly made and received and filed in the office of the United States Land Office at Vancouver, Washington, and the said F. A. Hyde & Company furnished said officials of said Land Office with an abstract of title duly authenticated, showing the title of the land so relinquished from the Government back to the United States, and also furnished due proof that said lands so selected in lieu thereof were vacant, unoccupied, nonmineral public lands open to entry and settlement and in all other respects complied with the laws, rules and regulations of the Government

applicable, and the said application was filed and proof was made and received in the said United States Land Office **[10]** at Vancouver, Washington, and in accordance with the customs, rules, and regulations in force and generally observed in said Department by the officials thereof, and by persons having business therein, and the said F. A. Hyde & Company, and their successors in interest, thereupon became the equitable owners and entitled to a patent to the said lands, but the Department of the Interior wrongfully and by mistake of law, and on or about December 21st, 1901, decided that said original application was invalid on the ground, and for the reason that at the time it was filed the sixty-day limit allowed the State of Washington to make selections of the public lands in said township 11 north, range 4 east, had not expired, and in that particular the complainants further allege that on March 29, 1900, to wit, at the time said F. A. Hyde & Company made said application and entry, and also on March 2, 1902, when the second application was made, as in paragraph five hereof stated, there was in force and generally observed in the Land Department of the United States, particularly in the United States Land Office at Vancouver, Washington, a custom, rule and regulation whereby applications such as those so made by F. A. Hyde & Company, were received and filed, and held, notwithstanding the fact that there was also on file at the same time a prior application or a request similar to that made by the State of Washington, as heretofore in paragraph three hereof alleged; and that pursuant to said claim, rule and

regulation, the said subsequent applications of F. A. Hyde & Company were received subject to any such prior applications and particularly to whatever selections the said State of Washington might make, as by law provided, within sixty days after the survey of said lands was made and filed, and subject to the final disposition of such prior applications, and in this instance that under [11] the said customs, rules and regulations the said application so subsequently received and filed was understood to and did in fact become the exclusive application and appropriation of all lands included within its descriptions which were not so definitely selected by the State of Washington within the sixty-day limit, and complainants allege as aforesaid that within the sixty-day limit the said State of Washington did file its list of selections, and that the list of selections so made by it did not include the said west half (W. ½) of section 32, and complainants allege that thereupon and pursuant to the customs, rules and regulations in force and observed in said Land Office, and under and pursuant to the said Acts of Congress, the said application so made by F. A. Hyde & Company on March 29, 1900, and so received and filed by the officer of the said United States Land Office, did become the exclusive appropriation of said lands for the benefit of F. A. Hyde & Company and their successors, and that such appropriation took effect by relation to and as of the date of March 29th, 1900.

V.

That on March 3, 1902, after the sixty days allowed the State within which to file its list of selections

subsequent to the filing of the plat and survey of said lands as aforesaid had elapsed, and after all rights of the State of Washington in and to said west half of said section 32, or any part thereof, had lapsed as aforesaid, said F. A. Hyde & Company, pursuant to the terms of said Act of June 4, 1897, and pursuant to the customs, rules and regulations in force in and observed by the General Land Office and officials of the Land Department of the United States, made a second selection and application for an [12] entry upon the said west half (W. ½) of said section 32, township 11 north, range 4 east, of the Willamette Meridian, in lieu of certain other base land formerly owned by said F. A. Hyde & Co., and theretofore surrendered to and accepted by the United States Government in accordance with the provisions of said Act of June 4, 1897, and made due proof of all facts required to be proven under the terms of said Act to entitle said F. A. Hyde & Co. to the land so selected. Said selection was made in writing as required by law, and the said paper, together with certificates, affidavits, and other papers therein referred to, and as required by the rules and practice of the United States Land Department, were duly filed with the United States Land Office at Vancouver, Washington, on said March 3, 1902; that at the time of filing said second application and selection of said land, the said land was a part of the surveyed public lands of the United States, unappropriated and subject to entry and selection as aforesaid, and by virtue of the said second application thereof and entry thereon as aforesaid, by the said F. A. Hyde & Co.,

and the complainants, the said *F. A. & Co.,* their successors and assigns, thereupon became the equitable owners of said land, and became entitled to patent therefor; that prior to the time of making said second selection, the said F. A. Hyde & Co. were the owners under patent from the United States of the northeast quarter (NE. ¼) and the southeast quarter (SE. ¼) of section 16, township 9 north, range 28 west of San Bernardino Meridian, and containing 320 acres situate in the State of California, and that the lands so owned had subsequent to the patenting of the same by the United States been included within the boundaries of the Pine Mountain and Zaca Lake Forest Reserve, and that the said F. A. Hyde & Co., as [13] the owners thereof, had duly relinquished and reconveyed the said lands to the United States, and that the said second application made by the said F. A. Hyde & Co., for the said west half (W. ½) of said section 32, township 11 north, range 4 east, was so made by them in lieu of said 320 acres of land so relinquished, and that the said second application was accompanied by an abstract of title duly authenticated and certified, showing chain of title to the land so relinquished from the Government back again to the United States, together with due proof from the public officers showing that the said land so relinquished was free from incumbrances of any kind, and that all taxes thereon to the date of said second application had been paid, together with affidavits showing the said lands so selected in lieu thereof were nonmineral and nonsaline in character and unoccupied, and that the said

F. A. Hyde & Co. in all other respects conformed to the acts of Congress and laws of the Land Department of the United States; that the said second application, with all papers accompanying the same, were duly received and filed by the officers of said Land Department at Vancouver, Washington, and duly forwarded to the Commissioner of the General Land Office at Washington, D. C., for consideration and approval, all in accordance with the acts of Congress applicable thereto.

That prior to March 29, 1900, and for the purpose among other things of facilitating the exercise by those entitled thereto of the rights provided under the said act of June 4, 1897, for the owners of lands included in forest reserves, and for the purpose of facilitating the transfer of such rights and giving the same some practical value in accordance with the intent and purpose of said act of June 4, 1887, the Department **[14]** of the Interior had promulgated the rule of allowing and permitting the owner or owners of such lands to file applications as aforesaid for timber lands in lieu thereof by and through an attorney or attorneys in fact appointed for that purpose by the said owners by written power of attorney, and that prior to said March 29, 1900, the practice and custom had grown up and become established and was universally observed in the United States Land Offices with the knowledge, consent and approval of the Secretary of the Interior and all of the officials of the Land Department of the United States wherein and whereby the said rights to select lieu lands were regularly and usually

and commonly sold in the open market and the said rights exercised under powers of attorney by persons other than the original owners of the lands that had been included in United States forest reserves.

That pursuant to said practice and customs the abstract of title and written power of attorney and other papers evidencing the right shown by the original owner of the land included in any particular forest reserve, became known as lieu land scrip and was bought and sold in the open market for value, and the rights thereunder were exercised by the final purchasers thereof to the extent of many thousands of acres all with the knowledge, consent and approval of the various registers and receivers of the various land offices of the United States and the Secretary of the Interior and other officials of the Department of the Interior of the United States.

That this practice and custom was so observed and followed and consented to and approved of by the officials of the United States Land Office and Department of the Interior as aforesaid in a thousand or more instances between the date [15] of the passage of said act of June 4, 1887, and said March 29, 1900, and thereafter continuously until after March 3, 1902.

That your complainants had knowledge of the said practice and custom and of the knowledge, consent to and approval thereof by the said officials of the United States Land Offices and of the Department of the Interior and in reliance thereon and in good faith purchased of the said F. A. Hyde & Company their said rights under the surrender and conveyance

by said F. A. Hyde & Company to the United States of the 1120 acres of land referred to in paragraph 4 hereof and on the said 320 acres of land referred to and described in paragraph 5 hereof, and that your complainants have succeeded to all of the rights, titles and interests of the said F. A. Hyde & Co. under said relinquishments and conveyances and the said applications made in the name of F. A. Hyde & Co. as aforesaid, and are entitled to have patents to the said lieu lands so selected and applied for issued and confirmed in their said grantors, said F. A. Hyde & Co., or to the complainants as their said successors and assignees.

That the said second application, as also the said original application for said lands, made in the name of F. A. Hyde & Co., was in truth and in fact made for and on behalf of complainants herein as the purchasers and owners of the rights of the said F. A. Hyde & Co. to make selection of public and unappropriated lands for and in lieu of the base land theretofore surrendered by said F. A. Hyde & Co. to the United States as aforesaid, and on December 24, 1900, complainants duly filed and caused to be recorded in the office of the Auditor of Lewis County, Washington, in Volume 1 of Powers of Attorney, at page 341 (the lands hereinbefore being situate in said Lewis County, [16] Washington), the original power of attorney executed by the said F. A. Hyde & Co. to one Charles Hill, authorizing said attorney to select lieu lands in lieu of the base lands theretofore owned and surrendered in the United States Government by said F. A. Hyde & Co., as

aforesaid, and with full power to sell and dispose of the lands so selected, and also on December 24, 1900, caused to be filed and recorded in the office of the Auditor of said Lewis County, Washington, in volume 59 of Deeds, at page 418, a deed conveying to complainants all rights, titles, and interests in and to said west half (W. ½), of section 32, township 11 north, range 4 east, and complainants allege that in fact and in truth the said Charles Hill, so appointed attorney in fact for the said F. A. Hyde & Co., was the agent and trustee of and for your complainants of all rights and interests which the said F. A. Hyde & Co. had to select lands in lieu of the base lands surrendered as a part of the said original application made in the name of F. A. Hyde & Co., on March 29, 1900, and to select lands in lieu of the lands owned by the said F. A. Hyde & Co., and surrendered as a part of selections made under the second application made in the name of F. A. Hyde & Co. on March 3, 1902. That the instruments and papers so filed in the United States Land Office at Vancouver, Washington, and in the office of the Auditor of Lewis County, Washington, were notice of the contents thereof to the world under and in accordance with the provisions of the Statutes of the State of Washington, and particularly under and in accordance with the provisions of Section 8781, Remington & Ballinger's Annotated Codes and Statutes of the State of Washington, and acts amendatory thereof. **[17]**

That the rights so acquired by your complainants under the relinquishments and conveyances to the United States of said 1440 acres of land and under

the selections made in lieu thereof as aforesaid were expressly recognized, protected and confirmed by the provisions of the Act of Congress of June 6, 1900, entitled Sundry Civil Appropriation Act 31 Stat. L., page 614, and also by the provisions of the Act of Congress of March 3, 1901, 31 Stat. L., page 1037 and by the provisions of the Act of Congress of March 3, 1905, 33 Stat. L., p. 1264, and the rejection of your complainants' first or original application and selection as aforesaid and the issuing of patents to other parties as hereinafter stated, to the lands so selected, and in disregard of your complainants' said rights under said relinquishments and conveyances of the base land and said original and supplementary selections of the said lieu land was and each of said acts was in violation of the provisions of said acts and was and is unauthorized and void.

VI.

That shortly after the filing of said second application and entry upon said land, to wit, on or about the 21st day of November, 1902, the Land Department of the United States promulgated a rule and order suspending all further proceedings upon entries made with any of the so-called Hyde scrip, which order had never been revoked and is still in force, and which order affected said second application. That no action has been taken by the United States Land Department since that date on said second application and selection of your complainants and their assignors as aforesaid; that your petitioners have at all times and in all things exercised due diligence in attempting to secure a hearing before the land

Department of the United States upon their said second application and entry upon said lands made on March 3, 1902, as aforesaid; that no hearing has ever been had thereon, and no action has ever been taken thereon, and the same remains and is still pending before the Land Department of the United States as aforesaid.

VII.

That on or about May 1st, 1908, a United States patent for a portion of the said lands, to wit, the west one-half (W. ½) [18] of the southeast quarter (SE. ¼) and the southeast quarter (SE. ¼) of the southwest quarter (SW. ¼) of section thirty-two (32), township eleven (11) north, range four (4) east, of the Willamette Meridian, was issued by the United States Government to the defendant Raymond S. Gray, said Raymond S. Gray having theretofore made a certain pretended entry and application for the purchase of said land; that on or about November 8, 1905, a United States Patent covering certain other portions of said lands, to wit, the west half (W. ½) of the northwest quarter (NW. ¼) and the southeast quarter (SE. ¼) of the northwest quarter (NW. ¼) and the northeast quarter (NE. ¼) of the southwest quarter (SW. ¼) of said section thirty-two (32), was issued by the United States to the defendant Charles S. Forbes, having theretofore made a certain pretended entry on and application for the purchase of said land; that on or about the 30th day of December, 1907, a United States patent covering the other portion of said lands, to wit, the northeast quarter (NE. ¼) of the northwest

quarter (NW. ¼) of said section thirty-two (32), was issued by the United States to John H. Patten, said John H. Patten having theretofore made a certain pretended entry on and application for the purchase of said land. That the United States patent to Raymond S. Gray was recorded in volume 1 of patents, at page 637, and was filed for record in the office of the Auditor of Lewis County, Washington, on September 29, 1906, and designated as fee number 36,222. That said United States patent to Charles S. Forbes was recorded in volume 5 of patents, at page 474, and was recorded in the office of the Auditor of said Lewis County, Washington, on or about June 15, 1907, and designated as fee number 40,758. That said United States patent to John H. Patten was recorded in Volume 7 of United States [19] Patents, at page 362, and on February 5, 1908, was recorded in the office of the Auditor of said Lewis County and designated as fee number 43,738. That thereafter and prior to the commencement of this suit various transfers of the said property have been made or attempted to be made by the said patentees to one or more of the other defendants herein, and that under and by virtue of the said patents and the said divers mesne conveyances and under the covenants of warranty contained in the various deeds made or attempted to be made by the said defendants of the said lands, or some portion thereof, the said defendants claim to have some right, title or interest in and to the said lands or some portion thereof, the exact nature and particulars of which said claims and interests, if any, your com-

plainants have no knowledge of, other than as herein stated; but complainants allege that in fact and in truth each and every of the said patents in this paragraph hereinbefore described was and were issued as aforesaid in contravention of the rights, claims and interests in and to said lands of or belonging to your complainants and their said grantors, F. A. Hyde & Co., and without any knowledge thereof on the part of these complainants or their said grantors, and that each and every of the said divers deeds made or attempted to be made of said lands, or some portion thereof, by and between these defendants as aforesaid, were made in contravention of the claims, rights and interests in said lands of these complainants, and their said grantors, and without any knowledge thereof on the part of these complainants or their said grantors, F. A. Hyde & Co., and said patents and deeds were and are void and should be canceled. And complainants further allege that each and every of said defendants, at the time of making their said pretended applications [20] for and entry upon and purchase of said lands from the United States Government and at the time of the issuance of the United States patent therefor as aforesaid, and at all times since prior to the commencement of this action, by the exercise of due diligence could have acquired and should have acquired full knowledge, of the rights, claims and interest of these complainants, and their said grantors, in and to the said premises, and as complainants are informed and verily believe did have actual notice and knowledge thereof, and that whatever claim, right, title or in-

terest these defendants or any of them had in and to the said premises was acquired with full knowledge of the said prior right of these complainants and their said grantors, F. A. Hyde & Co., in and to the said lands or any part thereof, have been so or otherwise acquired by said defendant, or any of them, are wholly subsequent, inferior and subject to the said right, and title of the complainants thereto. That the complainants had no knowledge of the making of said attempted entries upon said land by and on behalf of certain of said defendants, or of the said pretended patents and deeds, or of any of them, until shortly prior to the commencement of this suit. That complainants were relying in good faith upon the validity of their said applications for said lands as a fully and complete appropriation of the said lands to themselves exclusively, and upon the fact that their said application and entry made March 3, 1902, was still pending before the Land Department of the United States for approval thereof and for issuance of patent thereon, and that as soon as complainants were fully advised and that by mistake and error on the part of the defendants and the officials of the Land Department, other persons were making or had been making entries on and attempts to secure said lands, [21] and that these complainants were being or might be defrauded of their rights and interests in said lands, your complainants at once commenced this action. That each and every of said pretended entries so made by said defendants on said land was permitted by the officials of the Land Department of the United States, and the said patents

to said land were issued as aforesaid by and on mistake of facts as well as law, and for the reason that said United States officials overlooked the fact that said second application made in the name of F. A. Hyde & Co. was still pending before the Land Department and was undisposed of, and that said lands under and by virtue of said second application had already been exclusively appropriated to and by said mistake, the exact nature of which is unknown to complainants, the pendency of said second application, and complainants' rights thereunder, were overlooked and forgotten and said patents erroneously and illegally issued as aforesaid.

VIII.

That on or about November 2, 1890, the Northern Pacific Railway Company attempted to file in the United States Land Office at Vancouver, Washington, a list of selections under the provisions of the Acts of Congress of March 2, 1899, which list included the west half (W.½) of section 32, township 11 north, range 4 east, but the said selection was never accepted or received by the officials of the said Land Office, but was expressly rejected, and that any and all rights which the said Northern Pacific Railway Company might have had in the said lands under a selection properly made and received and filed in said Land Office were long prior to the inception of any title or interest in said lands by or on behalf of any of defendants wholly waived and abandoned, and other lands selected by patent to [22] said Northern Pacific Railway Company, in lieu thereof.

IX.

That the issuance and record of the said United States Patents to said lands as aforesaid, and the making and entry of the said pretended deeds of said lands, or some part thereof which have passed between the defendants, as aforesaid, constitute, and each and every of the said instruments and the record thereof constitute, a cloud upon the title of these complainants to the said lands.

X.

That the premises considered, the defendants and each and every of them so far as they have any apparent record or legal title to the said lands under and by virtue of the said United States Patents issued therefor as aforesaid and the divers mesne conveyances issued as between the said defendants, are in fact and in truth holders of the legal title of said lands in trust for these complainants.

XI.

That said lands are vacant and unoccupied lands.

XII.

That the complainants have no speedy, adequate or sufficient remedy at law, and that it is necessary for complainants to invoke the equitable powers of the courts as herein prayed for.

WHEREFORE, complainants pray:

(1) That a monition or other process in accordance with the custom and practice of the Court may be issued and served upon the defendant requiring each of them to appear in court and make full and true answer upon oath of the matters set forth in this third amended bill of complaint, and particularly

to set [23] forth whatever right, title or interest they or any of them have or claim to have in and to the said property or any part thereof in the complaint described;

(2) For the decree of this Court establishing and declaring these complainants to be the sole and exclusive owners of the said lands in the complaint described, and of each and every part thereof, free and clear of any right, title or interest therein or thereto, of or belonging to the said defendants or any of them, or any person claiming by, through or under them, or any of them, and establishing and declaring that each and every of the said defendants so far as they or any of them have an apparent or legal title to any portion of the said lands under and by virtue of the United States patents heretofore issued therefor as in the complaint alleged and in this third amended complaint alleged and conveyances from the patentees therein named are in fact and in truth holders thereof in trust for the sole and exclusive use of these complainants, and ordering and directing the said defendants to execute and deliver to these complainants and their legal representatives a good and sufficient deed or deeds of the premises in this third amended complaint described, and for the further order of this Court appointing a special Commissioner to carry out the said order and decree of the Court and to execute and deliver to the complainants such deed or deeds of the premises, in the event that any of the said defendants fail to do so within such reasonable time as the Court shall fix for executing and delivering to the complainants such

deed or deeds, or that said patents and deeds be ordered cancelled;

(3) Or in the alternative declaring the said several deeds conveying the said premises, or any part thereof, to the [24] said defendants, or any of them, and all other deeds of conveyance of said lands, or any part thereof, to the said defendants, or any of them, and all other deeds of conveyance of the said lands, or any part thereof, made by and between the said defendant or any of them, to be wholly void, and ordering same to be cancelled and set aside of record;

(4) That these complainants have such other and further or different relief as to the Court may seem best.

HERBERT S. GRIGGS,
Attorney for Complainants.

Office: 1115 Fidelity Bldg., Tacoma, Wash.

State of Washington,
County of Pierce,—ss.

Herbert S. Griggs, being first duly sworn, on oath deposes and says: That he is the attorney for the complainants in the above-entitled cause; that he makes this verification for the reason that all of the complainants are nonresidents of the State of Washington, and are not now within the said State of Washington; that he has read the foregoing Third Amended Bill of Complaint, knows the contents thereof, and that the same are true, as he verily believes.

HERBERT S. GRIGGS.

Subscribed and sworn to before me this 28 day of October, 1913.

[Seal] C. E. STEVENS,
Notary Public in and for the State of Washington,
Residing at Tacoma.

"Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 10, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [25]

Demurrer to Second Amended Bill.

The said defendant, the Milwaukee Land Company, not confessing all or any of the matters and things in the second amended bill of complaint herein to be true, as therein alleged, doth demur to said second amended bill for the following reasons:

I.

That it appears upon the face of said second amended bill that the said complainants are guilty of laches.

II.

That the said second amended bill is without equity and does not set forth any matters entitled said complainants to any relief in this court.

WHEREFORE, this defendant prays the judgment of this Court whether it shall be compelled to further answer make unto said second amended bill.

F. M. DUDLEY,
GEO. W. KORTE,
Solicitors for Defendant, Milwaukee Land Company.

I, F. M. Dudley, of counsel for the defendant, Mil-

waukee Land Company, in the above-entitled cause, do hereby certify that the foregoing demurrer to the second amended bill of complaint is in my opinion well founded in law.

F. M. DUDLEY.

(Verification.)

(Filed Jul. 25, 1912.) [26]

Stipulation [That Demurrers to Second Amended Bill of Complaint Shall Stand as Demurrers to Third Amended Bill of Complaint, etc.]

IT IS HEREBY STIPULATED by and between the complainants and the several defendants, by their respective counsel herein, that the demurrers heretofore filed herein by and on behalf of the defendants, or some of them, to the *seconded* amended bill of complaint shall stand as the demurrers of the said defendants, and each of them, to complainants' third amended bill of complaint, and that a hearing may be had upon the said demurrers on Monday, the 3d day of November, 1913, at Tacoma, Washington, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

HERBERT S. GRIGGS,
Attorney for Complainants.
F. M. DUDLEY,
PETERS & POWELL,
Attorneys for Defendants Barr and Wife.
W. A. REYNOLDS,
Attorney for Defendants Gray.
MOULTON & SCHWARTZ,
Attorneys for Defendants Huston.

(Filed Nov. 10, 1913.) [27]

Order Sustaining Demurrer and for Judgment.

Now, on this 10th day of November, 1913, the above-entitled cause coming on regularly for hearing before the Hon. EDWARD E. CUSHMAN, of the above-entitled court, upon the third amended bill of complaint on file herein, and the demurrers thereto on the part of the defendants and the written stipulation of the parties hereto, by their respective attorneys, on file herein, stipulating that the demurrers filed by the defendants to the second amended bill shall stand as the demurrers of said defendants, and each of them, to the third amended bill, and the Court being fully advised,—

IT IS ORDERED that the said demurrers be, and they are hereby, sustained; and complainants thereupon by their counsel, Herbert S. Griggs, in open court, having elected to stand upon their said third amended bill of complaint, and refused to plead further,—

IT IS CONSIDERED ORDERED AND ADJUDGED that the said third amended bill of complaint and this action be, and the same is hereby dismissed, and that the defendants herein, Raymond S. Gray and Sena Gray, his wife, W. A. Gray and Lois A. Gray, his wife, Charles S. Forbes and Adelaide F. Forbes, his wife, Frank L. Huston, John H. Patten and Dora W. Patten, his wife, W. W. Barr and Gertrude G. Barr, his wife, and Milwaukee Land Company, a corporation, do have and recover judgment against the plaintiffs W. H. Sawyer and Frances S. Sawyer, his wife, and Alfred C. Tuxbury

and Luna B. Tuxbury, his wife, for their costs and disbursements herein to be taxed.

IT IS FURTHER ORDERED AND ADJUDGED that all the [28] testimony heretofore taken herein and filed with the referee and all papers and documents on file with the said referee be remanded and placed on file with the clerk of the above-entitled court.

To all of which the complainants by their counsel duly except, and such exception is allowed.

EDWARD E. CUSHMAN,
Judge.

Dated Tacoma, Washington, November 10th, 1913.

(Filed Nov. 10, 1913.) [29]

Order [Substituting Parties Complainant].

On suggestion of the complainants and upon stipulation signed by attorneys for all parties and on file herein, it appearing that since the commencement of this action Alfred C. Tuxbury, one of the complainants, has died, and that Luna B. Tuxbury and Charles Hill have been duly appointed executors of the estate of said deceased, and that said Luna B. Tuxbury, Edith E. Tuxbury Hill, Alice Bosworth Tuxbury and Luna Elizabeth Tuxbury are the sole heirs of the estate of said deceased, and should be substituted as parties complainant to the above-entitled cause in lieu of said Alfred C. Tuxbury, deceased,—

IT IS ORDERED that said substitution be made and the said appearance of said executors and heirs

of said deceased may and shall be entered herein as parties complainant in lieu of said Alfred C. Tuxbury, deceased.

EDWARD E. CUSHMAN,
Judge.

1/12/14.

(Filed Jan. 12, 1914.) [30]

Assignment of Errors.

Now, this 2d day of February, 1914, come the complainants, by Herbert S. Griggs, their attorney and solicitor, and say: That the order and decree in the said cause entered herein by the Honorable E. E. CUSHMAN, Judge, on November 10, 1913, is erroneous and against the just rights of these complainants for the following reasons:

I.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the complainants or their grantors, on the 29th day of March, 1900, made a valid forest lieu selection of the west half of section thirty-three (33), township eleven (11) north, range four (4) east of Willamette meridian, under and in accordance with the provisions of the act of Congress of June 4, 1897, and acts amendatory thereof and the customs, rules and regulations of the General Land Office and Land Department of the United States as set forth in said bill and particularly in paragraph IV thereof.

II.

The Court erred in sustaining the demurrer to com-

plainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto the complainants or their grantors, on March 2, 1902, made a valid forest lieu selection of the lands in the preceding paragraph hereof described, under and in accordance with the provisions of the Act of Congress of June 4, 1897, and the Acts amendatory thereof, and the customs, rules and regulations of the Land Department and the General Land Office of the United States. [31]

III.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto the forest lieu selection of the complainants, or their predecessors in interest, F. A. Hyde & Company, on March 29, 1900, of the lands described in paragraph I hereof was prior in time to and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly the defendants.

IV.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the forest lieu selection of complainants, or their predecessors in interest, made upon the lands described in paragraph I hereof, on March 2, 1902, was prior in time to and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly the defendants.

V.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the pretended and attempted entries and applications for the purchase of all or portions of the land described in paragraph I hereof, made by the defendants or some of them, were each and all subsequent in time and inferior in right to the said forest lieu selections of the complainants or their predecessors in interest.

VI.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did [32] not hold that by the admissions of the demurrer thereto, the forest lieu selections of the complainants, or their predecessors in interest, had been in compliance with and conformity to the Acts of Congress applicable thereto and the customs, rules, and regulations of the Land Department and General Office of the United States applicable thereto, and by the transfer to complainants from their predecessors in interest, F. A. Hyde & Company, of all their rights to apply for forest lieu selections in lieu of the base land surrendered by said F. A. Hyde & Company to the United States in paragraphs IV and V of said Third Amended Bill of Complaint set forth, the complainants became the *bona fide* purchasers of said rights and under the forest lieu selections made by them thereunder as in paragraphs IV and V of the Third Amended Bill of Complaint stated, the complainants obtained a vested interest in the land so

selected and which land is described in paragraph I hereof.

VII.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the alleged entries and applications for the said land made by the defendants and the issuance of patents therefor, were made in contravention of the vested rights of the complainants herein.

VIII.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto the complainants were equitably entitled to be protected in the forest lieu selections which were made in the name of their predecessors in interest on the lands described in paragraph I hereof as **[33]** against the claims of the defendants or any of them or any person or persons whomsoever.

IX.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto the complainants were equitably entitled to have the defendants declared trustees for the complainants of the lands described in paragraph I hereof.

X.

The Court erred in sustaining the demurrer to the

complainants' Third Amended Bill of Complaint in that it did not hold that the rights and interests of the complainants in the said land described in paragraph I hereof, under the forest lieu selections made in the name of their predecessors in interest as set forth in paragraphs IV and V of the Third Amended Bill of Complaint and made and in accordance with the Act of Congress of June 4, 1897, and the customs, rules and regulations of the Land Department of the United States, had been recognized, approved, ratified and confirmed by the provisions of the Act of Congress of June 6, 1900; also by the provisions of the Act of Congress of March 3, 1901, and also by the provisions of the Act of Congress of March 3, 1905, and that the acts of the officials of the Land Department of the United States in attempting to disallow the said forest lieu selections made on March 29, 1900, and in neglecting to recognize, act upon, and approve the said forest lieu selection made on March 2, 1902, and in thereafter attempting to receive and recognize the subsequent entries and applications for said land made by the defendants, or some of them, and in issuing patents for said land or some **[34]** part thereof to the defendants, were each and all unauthorized, illegal and void and in contravention of the vested rights of the complainants in the said land.

XI.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint in that it did not hold that under the forest lieu selections made in the name of complainants' predeces-

sors in interest as set forth in paragraphs IV and V of the Third Amended Bill of Complaint, the complainants became the *bona fide* purchasers and the equitable owners of the said land described in paragraph I hereof, and entitled to the issuance of a patent thereof to them or to their said predecessors in interest, F. A. Hyde & Company.

XII.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the several defendants at and before the time they attempted to enter upon and purchase the land described in paragraph I hereof, they and each of them, had notice of the vested rights and interests therein of complainants and their predecessors in interest, and that the equitable interest of the complainants in and to the said land became vested by relation as of the dates of March 29, 1900, and March 2, 1902, and prior to the inception of any right or interest therein of the defendants, or any of them, or any other person, and that the equities of the complainants in the matter involved in said cause were and are superior to the equities of the defendants and declared trustees for the complainants, or their predecessors in interest, of the said lands described in paragraph I hereof. **[35]**

XIII.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint in that it did not hold that the said bill stated a good

cause of action to which the defendants should be required to file their several answers or pleas.

XIV.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendants.

WHEREFORE complainants and appellants pray that the decree of the said Court be reversed and such directions be given that full force and efficacy inure to the complainants by reason of the cause of suit set up in their Third Amended Bill of Complaint filed in said cause and that a decree be entered in accordance with the prayer of complainants' Third Amended Bill of Complaint.

HERBERT S. GRIGGS,
Attorney and Solicitor for Complainants.

"Filed in the U. S. District Court, Western District of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [36]

Petition for Appeal.

The above-named complainants, conceiving themselves aggrieved by the decree made and entered on the 10th day of November, 1913, in the above-entitled cause, do hereby appeal from said Order and Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Errors, which is filed herewith, and they pray that this appeal may be allowed and that

a transcript of the records, proceedings and papers upon which said Order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Tacoma, Washington, this 31st day of January, 1914.

HERBERT S. GRIGGS,
Attorney for Complainants.

(Filed Feb. 3, 1914.) **[37]**

Order Allowing Appeal [and Fixing Amount of Bond].

On petition of the complainants herein and on the motion of Herbert S. Griggs, their attorney, and upon the records and proceedings had and on file herein and the Assignment of Errors filed with the said petition,—

IT IS ORDERED that an appeal by the complainants from the order and judgment sustaining defendants' Demurrer to the Third Amended Bill of Complaint and dismissing the said cause entered herein on *November, 1913,* to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby allowed, and

IT IS FURTHER ORDERED that the said appeal is to operate as a *supersedeas* and stay upon the filing of a bond herein in the sum of Five Hundred Dollars, and Fidelity and Deposit Company of Maryland is hereby accepted on said bond as surety,

and said bond is now approved.

EDWARD E. CUSHMAN,
Judge.

(Filed Feb. 3, 1914.) **[38]**

Bond on Appeal.

WHEREAS in the above-numbered and entitled cause complainants W. H. Sawyer and Frances Sawyer, his wife, and Luna B. Tuxbury, wife of Alfred C. Tuxbury, deceased, and Luna B. Tuxbury and Charles Hill, as executors of the estate of Alfred C. Tuxbury, deceased, and Edith E. Tuxbury Hill, Alice Bosworth Tuxbury and Luna Elizabeth Tuxbury (having been substituted as complainants in lieu of said deceased), have petitioned for an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order and judgment of the Court entered in the above-entitled cause on the 10th day of November, 1913, and the said appeal has been allowed by the Honorable E. E. Cushman, Judge, of the above-entitled Court; and

WHEREAS, the said Court has fixed the security that the defendants shall give and furnish in the sum of Five Hundred and no/100 Dollars;

NOW, THEREFORE, W. H. Sawyer and Frances Sawyer, his wife, and Luna B. Tuxbury, wife of Alfred C. Tuxbury, deceased, and Luna B. Tuxbury and Charles Hill, as executors of the estate of Alfred C. Tuxbury, deceased, and Edith E. Tuxbury Hill, Alice Bosworth Tuxbury and Luna Elizabeth Tuxbury, principals, and American Surety Company of

New York, as surety, acknowledge themselves firmly bound unto the defendants in the sum of Hundred
E. E. C. Five ~~Thousand~~ Dollars conditioned that the complainants W. H. Sawyer and Frances Sawyer, his wife, and Luna B. Tuxbury, wife of Alfred C. Tuxbury, deceased, and Luna B. Tuxbury and Charles Hill, as executors of the estate of Alfred C. Tuxbury, and Luna Elizabeth **[39]** Tuxbury, shall prosecute its said appeal to effect, and if it fail to make its plea good shall answer all costs. The surety heretofore named hereby expressly covenants and agrees that in case of a breach of any condition of this bond, the above-entitled court upon notice to the surety of not less than ten days shall proceed summarily in which said bond is given to ascertain the amount which the said surety is bound to pay on account of the breach thereof, and render judgment therefor against the surety and award execution thereof against the surety.

IN TESTIMONY WHEREOF, witness the names of the parties hereto affixed by their duly authorized agents and officers, this 2d day of February, 1914.

W. H. SAWYER and
FRANCES SAWYER,
LUNA B. TUXBURY,
LUNA B. TUXBURY and
CHAS. HILL, as Ex., etc.,

EDITH E. TUXBURY HILL,
ALICE BOSWORTH TUXBURY and
LUNA ELIZABETH TUXBURY.
By HERBERT S. GRIGGS,
Their Atty. and Agent.
AMERICAN SURETY COMPANY OF NEW YORK,
Surety.
By FRANK ALLYN, Jr.,
Resident Vice-president.
Attest: C. E. DUNKLEBERGER,
Resident Asst. Secretary.
[Seal of Surety Company.]
(Filed Feb. 3, 1914.) [40]

Citation on Appeal.

To Raymond S. Gray and Sena Gray, His Wife; W. A. Gray and Lois A. Gray, His Wife, Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten and Dora W. Patten, His Wife, W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Defendants, Greeting:

WHEREAS, W. H. Sawyer et al., appellants in the above-entitled suit, have lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the Western District of Washington, Western Division, made in favor of you, the defendants in the above-entitled cause, and have filed the security required by law; you are therefore hereby cited to appear before the

said United States Circuit Court of Appeals at the city of San Francisco, State of California, on the 4th day of March, 1914, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the city of Tacoma, in the Ninth Judicial Circuit, this 2d day of February, in the year of our Lord one thousand nine hundred fourteen.

[Seal] EDWARD E. CUSHMAN,
Judge of the District Court of the United States.

(Filed Feb. 3, 1914.) [41]

[Certificate of Clerk U. S. District Court to Transcript.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return to the claim of appeal of W. H. Sawyer and Frances Sawyer, his wife et al., in a cause pending in said court wherein W. H. Sawyer et al. are complainants and appellants and Raymond S. Gray et al. are respondents and appellees, that the above and foregoing is a true copy of all papers filed and proceedings had and entered in said cause as the same appear on file and of record in my office, pursuant to stipulation of counsel filed herein; that I have compared the same with the originals and they are true and correct transcripts therefrom.

I further certify that I attach hereto and herewith

transmit the original Citation with return thereon;

I further certify that the cost of preparing and certifying said transcript amounts to the sum of $27.70, which amount has been paid to me by the solicitor for appellants.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of this court at Tacoma, in said District, this 23d day of February, A. D. 1914.

[Seal] FRANK L. CROSBY,
Clerk. [42]

Citation on Appeal [Original].

In the District Court of the United States for the Western District of Washington, Western Division.

No. 1696.

W. H. SAWYER et al.,
Complainants,

vs.

RAYMOND S. GRAY et al.,
Defendants.

To Raymond S. Gray and Sena Gray, His Wife, W. A. Gray and Lois A. Gray, His Wife, Charles S. Forbes and Adelaide F. Forbes, His Wife, Frank L. Huston, John H. Patten and Dora W. Patten, His Wife, W. W. Barr and Gertrude G. Barr, His Wife and Milwaukee Land Company, a Corporation, Defendants, Greeting:

WHEREAS, W. H. Sawyer et al., appellants in the above-entitled suit, have lately appealed to the

United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the Western District of Washington, Western Division, made in favor of you, the defendants in the above-entitled cause, and have filed the security required by law; you are therefore hereby cited to appear before the said United States Circuit Court of Appeals at the city of San Francisco, State of California, on the 4th day of March, 1914, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the city of Tacoma, in the Ninth Judicial Circuit, this 2d day of February, in the year of our Lord one thousand nine hundred fourteen.

[Seal] EDWARD E. CUSHMAN,
Judge of the District Court of the United States.

[Admission of Service of Citation on Appeal, etc.]

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.
Legal Department.

Seattle, February 6, 1914.

Mr. Herbert S. Griggs,
Tacoma, Wash.

Dear Sir:

This will acknowledge receipt of your letter of the 4th inst., enclosing copies of the papers hereinafter designated in the case of W. H. Sawyer et al. vs. Raymond S. Gray et al., viz.:

Citation on appeal;
Order allowing appeal;

Petition for appeal;
Bond of appeal;
Assignment of errors;
Suggestion on the death of one of complainants and Order of substitution.

Very truly yours,
F. M. DUDLEY,
General Attorney.

FMD–p.

No. 1696. Dist. Ct. U. S., West. Dist. Wn., West. Div.

[Endorsed]: No. 1696. In the United States District Court, Western District of Washington. W. H. Sawyer et al., Complainants, vs. Raymond S. Gray et al., Defendants. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2385. United States Circuit Court of Appeals for the Ninth Circuit. W. H. Sawyer and Frances Sawyer, His Wife, and Alfred C. Tuxbury and Luna B. Tuxbury, His Wife, Appellants, vs. Raymond S. Gray and Sena Gray, His Wife, W. A. Gray and Lois A. Gray, His Wife, Charles S. Forbes and Adelaide F. Forbes, His Wife, Frank L. Huston, John H. Patten and Dora W. Patten, His Wife, W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees. Transcript of Record. Upon Ap-

peal from the United States District Court for the Western District of Washington, Southern Division.

Received February 28, 1914.

F. D. MONCKTON,
Clerk.

Filed March 5, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. H. SAWYER and FRANCES SAWYER, his wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, his wife, *Appellants,*

vs.

RAYMOND S. GRAY and SENA GRAY, his wife; W. A. GRAY and LOIS A. GRAY, his wife; CHARLES S. FORBES and ADELAIDE F. FORBES, his wife; FRANK L. HUSTON, JOHN H. PATTEN and DORA W. PATTEN, his wife; W. W. BARR and GERTRUDE G. BARR, his wife, and MILWAUKEE LAND COMPANY, a corporation, *Appellees.*

No.....

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

BRIEF OF APPELLEES

F. M. DUDLEY,
Attorney for Milwaukee Land Company.

PETERS & POWELL,
Attorneys for Defendants Barr and wife.

W. A. REYNOLDS,
Attorney for Defendants Gray.

C. E. MOULTON,
Attorney for Defendants Huston.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. H. SAWYER and FRANCES SAWYER, his wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, his wife, *Appellants,*

vs.

RAYMOND S. GRAY and SENA GRAY, his wife; W. A. GRAY and LOIS A. GRAY, his wife; CHARLES S. FORBES and ADELAIDE F. FORBES, his wife; FRANK L. HUSTON, JOHN H. PATTEN and DORA W. PATTEN, his wife; W. W. BARR and GERTRUDE G. BARR, his wife, and MILWAUKEE LAND COMPANY, a corporation, *Appellees.*

No.....

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

BRIEF OF APPELLEES

The district court entered a judgment in favor of the defendants below, who are appellees here, upon sustaining their general demurrer to the third amended bill of complaint, and the complainants have appealed from that judgment. Therefore, the question presented to this court is whether the facts set forth in the bill entitle complainants to any relief.

The complainants claim that the United States has issued to certain of the defendants patents for public lands which should have been patented to the complainants, and that the defendants now hold these lands as trustees for the complainants.

The essential facts set forth in the bill of complaint are as follows:

That on January 25, 1899, the State of Washington, under the Act of Congress of August 18, 1894, requested the Commissioner of Public Lands to extend the United States surveys to Township 11 North, Range 4 E., W. M., in the state of Washington; that this survey was made and the plat thereof filed in the United States Land Office at Vancouver, Washington, on April 10, 1901; that the Act of August 18, 1894, provides that the land so surveyed shall be reserved until the expiration of sixty days from the filing of the survey, during which period of sixty days the state asking for the survey may select any of such lands in satisfaction of the grant made to it by the United States upon its admission into the union; that the survey included the lands in controversy, but that the State of Washington did not select them.

It is further alleged that prior to the filing of the survey, to-wit: On March 29, 1900, F. A. Hyde

& Co. made application to the United States Land Office at Vancouver, to enter the lands in lieu of certain lands within a forest reserve, and which it conveyed and relinquished to the United States; that the lands in controversy were at that time vacant, non-mineral, public lands, subject to homestead entry; that by the aforesaid application F. A. Hyde & Co. became the equitable owners and entitled to a patent to said lands; that the Department of the Interior on December 21, 1901, rejected the application for the reason that at the time when the application was made the lands were not subject to entry because of the fact that the time had not yet expired within which, under the Act of Congress of August 18, 1894, they were to be reserved for selection by the State of Washington; that thereafter, on March 3, 1902, F. A. Hyde & Co. filed a second application in the United States Land Office at Vancouver, Washington, to enter the said lands in lieu of certain other forest reserve lands owned by it and which it then conveyed and relinquished to the United States, and that it thereby became the equitable owner of said land and entitled to a patent therefor; that this second application of F. A. Hyde & Co. was forwarded by the officers of the Land Department at Vancouver, Washington, to the Commis-

sioner of the General Land Office for consideration and approval, and that the said application has never been acted upon by the Commissioner. That both of the aforesaid applications by F. A. Hyde & Co. were made pursuant to the Act of Congress of June 4, 1897. That after the aforesaid applications of F. A. Hyde & Co. had been filed, certain of the defendants made application to purchase the lands and in due course received patents therefor, and that all of the defendants are either such patentees or their grantees, all having acquired their rights with knowledge and notice of the complainants' claim. That the patents so issued were issued by mistake in that the United States officials overlooked the fact that the second application of F. A. Hyde & Co. was still pending.

The relief asked for is, (1) a decree declaring the plaintiffs to be the sole and exclusive owners of such lands free and clear of any right, title or interest therein or thereto of or belonging to any of the defendants, and declaring the defendants, so far as they or any of them have any apparent or legal title to such lands under or by virtue of the said patents, to be trustees thereof holding the same for the sole and exclusive use of the plaintiffs and requiring the defendants to execute such trusts by

a conveyance of the lands to the plaintiffs; or (2) in the alternative the entry of a decree declaring the various deeds conveying the lands, or any thereof, to the defendants and all other deeds of conveyance of the lands to the defendants made by and between the several defendants, or any of them, to be wholly void and ordering the same to be cancelled and set aside of record; (3) coupled with the foregoing prayers is a prayer for general relief.

The bill does not charge that the patents under which the defendants claim were procured, or that any of the conveyances made by the patentees, or their grantees, were made fraudulently or through any fraud perpetrated upon the plaintiffs. The position of the plaintiffs is that prior to the issuance of the patents they had acquired a claim or right to, or interest in the lands, which was prior in time and, as they contend, therefore superior in right to the interest conveyed by the patents.

ARGUMENT.

The Land Department of the United States is a quasi judicial tribunal charged with the duty of supervising the disposition of the public lands of the United States under the provisions of the acts of Congress authorizing such disposition, and the

patents of the United States issued by the Interior Department not only operate as deeds conveying the legal title to the lands embraced in the patent to the grantee but they are also evidence of an adjudication by the Department that the lands so conveyed were public lands subject to be so conveyed and that the patentee has complied with all of the provisions of the particular act of Congress under which the patent is issued entitling him to a conveyance thereof. This determination, in all cases where it has jurisdiction, is not subject to collateral attack and is, in the absence of fraud or mistake of law, conclusive. Of course, if the land with which the proceeding before the Department is concerned, is not public land of the United States over which it has jurisdiction under the authority of the public land laws, the decision of the Department with respect thereto is a nullity.

Dolan vs. Carr, 125 U. S. 618.

But where the Department has jurisdiction of the land, it belonging to the United States and being subject to disposition under the public land laws of the United States, the patent when issued operates, as above stated, to convey to the patenteee the legal title. If, however, through fraud or mistake of law the legal title is thus conveyed to and vested in A,

although B was in equity entitled thereto, B can maintain an action to have A declared a trustee, holding the title to the land for his benefit, and require a conveyance thereof to B. It is evident, however, that parties who do not connect themselves with the United States, showing a right or interest derived from the United States, cannot be heard to assail the judgment of the Interior Department, or the conveyance issued by the United States pursuant thereto unless such conveyances be an absolute nullity.

It will be noted that the complainants allege and apparently rely upon two totally distinct attempts to select the land in question, the first made March 29, 1900, and the second March 3, 1902. As the condition of the land at the time of the attempted selection in 1900 was materially different from its condition at the time of the second attempted selection in 1902, it is necessary to consider to some extent these attempted selections separately.

I.

(a) March 29, 1900, when the first application to select this land was made, it was unsurveyed land. The bill alleges (par. 3) that the township plat was filed in the United States Land Office at Vancouver,

Washington, April 10, 1901. It is the settled doctrine of public land law that lands are not considered as surveyed lands until the township plat has been filed.

U. S. vs. Curtner, 38 Fed. Rep. 1, 9-10.

S. P. R. Co. vs. Burlingame, 5 L. D. 415, 417, and cases cited.

It is further settled that the survey does not identify but creates the sections and townships.

> "Even after a principal meridian and a base line have been established and the exterior lines of the townships have been surveyed, neither the sections nor their subdivisions can be said to have any existence until the township is subdivided into sections and quarter sections by an approved survey. The lines are not ascertained by the survey but they are created, and although a surveyor may, in advance of the making of the subdivision of the township by the deputy of the United States Surveyor General, run lines with the greatest practical exactness from the corners established on the exterior lines of the township to ascertain the bounds of any given quarter-quarter section, still when the survey comes to be made under the direction of the Surveyor General the difference between the two surveys may be such that the forty acre lot which, under the private and theoretically the more accurate survey appear to fall within the lands listed to the state, will be excluded from the list, or vice versa."

Robertson vs. Forrest, 29 Cal. 317, 325.

Middletown vs. Lower, 30 Cal. 596, 604-5.

Bullock vs. Rouse, (Cal.) 22 Pac. Rep. 919, 920.

Smith vs. City of Los Angeles (Cal.), 112 Pac. Rep. 307, 310.

It follows that the application of Hyde & Co. made March 29, 1900, for the west half of section 32, township 11 north, range 4 E., W. M., *eo nomine* was an impossibility for such Government subdivisions did not then exist.

(b) It is alleged that the application made March 29, 1900, was rejected by the Interior Department December 31, 1901, upon the ground that it was prematurely made in that the lands were, at the time of the filing of the aplication by Hyde & Co., reserved to permit the State of Washington to make selections in this township. By act approved August 18, 1894, 28 Stat. 372, 394-5, it was provided that the governors of certain states, including the State of Washington, might apply to the Commissioner of the General Land Office for the survey of any township or public lands remaining unsurveyed and that the lands that might be found to fall within the limits of such township, as ascertained by the survey, should be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise for a period to extend

from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the state might select any of such lands, not embraced in any valid adverse claim for the satisfaction of such grants.

It is charged in the third paragraph of the bill that the State of Washington on January 25, 1899, requested the Commissioner to survey the public lands in the township in which the land in controversy is situated under the provisions of this act and that the same were surveyed pursuant to this request and the plat filed in the district land office April 10, 1901. The land in question was therefore reserved "from any adverse appropriation by settlement or otherwise except any rights that may be found to exist of prior inception" from the date of the application January 25, 1899, until the expiration of sixty days from the filing of the township plat, namely, until June 9, 1901. As the Forest Reserve Act, under which the complainants claim, permitted the selection only of vacant lands "open to settlement" the land in this township was not subject to selection during the period between January 25, 1899, and June 9, 1901, during which period

the first application by the complainants was made and this application was therefore properly rejected. It is charged in the bill that on March 29, 1900, at the time Hyde & Co. made this application, there was in force and generally observed in the Land Department and particularly in the United States Land Office at Vancouver, Washington, a custom, rule and regulation whereby such applications were received and filed and held subject to the possibility of the land being selected by the state, and that according to such custom and rule, if the land was not selected by the state at the expiration of the period of reservation, the selection theretofore made by the applicant under the Forest Reserve Act became effective as of the date of its filing and it is further charged that this particular application was so received and held (Par. 4 of Bill).

The rules and regulations, even of the Interior Department, cannot set aside or annul the positive provisions of the act of Congress and *a fortiori* a rule existing in the district land office could have no force or effect whatsoever in protecting an application made under the Forest Reserve Act at a time while the lands were reserved. As held in *Cosmos Co. vs. Gray Eagle Co.*, 190 U. S. 301, the district land officers were totally without authority to make

any rules or regulations under this act, and the settled construction of this act by the Department is that it operates as a withdrawal of the lands for the period named.

Ziegler vs. State of Idaho, 30 L. D. 1.

McFarland vs. State of Idaho, 32 L. D. 107.

Kay vs. State of Montana, 34 L. D. 139.

Thorpe et al. vs. State of Idaho, 35 L. D. 640.
Id., 36 L. D. 479.

Moreover, in the Sundry Civil Appropriation Act of March 3, 1893 (27 Stat. 592), Congress provided:

> "That the states of North Dakota, South Dakota, Montana, Idaho and Washington shall have a preference right over any person or corporation to select lands subject to entry by said states granted to said states by the act of Congress approved February 22, 1889, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States and provided further that such preference right shall not accrue against bona fide homestead or pre-emption settlers on any of said lands at the date of filing of the plat of survey of any township in any local land office in said states."

It will be noted that this act is very similar to the act of August 18, 1894. It is held, however, that the later act does not repeal the earlier.

McFarland vs. State of Idaho, 32 L. D. 107.

Kay vs. State of Montana, 34 L. D. 139.

May 10, 1893, the Interior Department promulgated certain regulations controlling the execution of that act. Paragraph 2 of these regulations provided:

> "During said period of sixty days no person not claiming in virtue of settlement existing at the date of filing of the plats, nor corporation, will be allowed to enter the lands subject to selection by the respective states, but the law cannot be held to inhibit during said period, the selection of lands previously granted to a corporation by Congress as, for instance, the granted sections within the primary limits of a railroad grant."

16 L. D. 462.

The court takes judicial notice of these rules and regulations.

Caha vs. U. S., 152 U. S. 211, 221.

Cosmos Co. vs. Gray Eagle Co., 190 U. S. 301, 309.

No new or additional regulations were issued after the passage of the act of 1894, and it is obvious that the regulations prescribed under the act of 1893 were deemed as applicable also to the act of 1894, but whether this be so or not the regulations under the act of 1893 constituted a departmental interpretation of the statute which was equally applicable to the statute of 1894 and under this interpretation the local officers were without authority

to accept the filing of Hyde & Co. prior to the expiration of sixty days from the filing of the township plat.

Further, although the bill does not refer to the act of 1893, or to the regulations issued thereunder, it is obvious that this act and these regulations were applicable to the township in question and that under this act and these regulations the land was not subject to selection at the time Hyde & Co. attempted to select it March 29, 1900, and that therefore the selection was properly cancelled by the Interior Department.

(c) By the subsequent attempted selection of this land made by Hyde & Co. March 3, 1902, that compnay and the complainants, as claiming under it, acquiesced in the rejection of the original attempted selection of March 29, 1900, and waived any rights which they might otherwise have had thereunder. The right of selection given by the Forest Reserve Act of 1897 is confined to vacant land open to settlement. The complainants cannot therefore be heard to contend that the attempted selection of March 29, 1900, operated to appropriate this land, and at the same time contend that it was vacant land open to selection in 1902 and when they made the second application on March 3, 1902, basing it, as they

necessarily did, upon a claim that the land in question was vacant and open to settlement they, of necessity, abandoned and relinquished all claims under the original attempted selection. This is especially true in view of the fact that by the second application Hyde & Co. offered for the exchange entirely different lands as a basis of their selection.

II.

It is charged in the fifth paragraph of the bill that on March 13, 1902, Hyde & Co. again made application to select the land in controversy under the provisions of the act of June 4, 1897. The allegation is that "pursuant to the terms of said act of June 4, 1907, and pursuant to the customs, rules and regulations in force in, and observed by, the General Land Office, and officials of the Land Department of the United States" Hyde & Co. "made a second selection and application for and entry upon" the land in controversy in lieu of other base land formerly owned by Hyde & Co. and "theretofore surrendered to and accepted by the United States Government in accordance with the provisions of said act of June 4, 1897, and made due proof of all facts required to be proven under the terms of said act to entitle said F. A. Hyde & Co. to

the lands so selected. Said selection was made in writing as required by law and the said paper, together with certificates, affidavits and other papers therein referred to, and as required by the rules and practice of the United States Land Department, were duly filed with the United States Land Office at Vancouver, Washington, on said March 3, 1902; that at the time of filing said second application and selection of said land, the said land was a part of the surveyed public lands of the United States unappropriated and subject to entry and selection as aforesaid, and by virtue of the said second application thereof and entry thereon as aforesaid by the said F. A. Hyde & Co. and the complainants, the said F. A. Hyde & Co., their successors and assigns thereupon became the equitable owners of said land, and became entitled to patent therefor". It is further alleged that prior to the time of making this application Hyde & Co. were the owners of certain lands included in a forest reserve in California and that they had, as the owners thereof, "duly relinquished and reconveyed the said lands so relinquished" and "that the second application was accompanied by an abstract of title, duly authenticated and certified, showing chain of title to the lands so relinquished from the Government back

again to the United States, together with due proof from the public officers showing that the said land was relinquished, was free from encumbrances of any kind, and that all taxes thereon to the date of said second application had been paid, together with affidavits showing the said lands so selected in lieu thereof were non-mineral and non-saline in character and unoccupied; and that the said F. A. Hyde & Co. in all other respects conformed to the acts of Congress and laws of the United States and the customs, rules and regulations of the Land Department of the United States".

It is then alleged that this second application, with the papers accompanying the same, were received and filed by the officers of the Land Department at Vancouver, Washington, and forwarded to the Commissioner of the General Land Office for consideration and approval, "all in accordance with the acts of Congress applicable thereto."

It is obvious that these allegations are for the most part not allegations of fact. They are all, or nearly all, conclusions of the pleader only. The court cannot determine, from an inspection of the bill, what was done, or whether the proofs furnished were those required by law, or the regulations of the Department, and the failure to allege facts from

which the court can see that the selection was sufficient to pass an equitable interest in the land is fatal to a bill of this nature.

> *James vs. Germania Iron Co.* (C. C. A.), 107 Fed. Rep. 597, 600.
>
> *Le Marchel vs. Teagarden* (C. C. A.), 152 Fed. Rep. 662, 665-6.
>
> *Durango Land & Coal Co. vs. Evans* (C. C. A), 80 Fed. Rep. 425, 430.

Disregarding, however, the conclusions of law that these acts were duly done and in conformity with the rules and regulations and that thereby F. A. Hyde & Co. and the complainants as their successors, secured an equitable title to the land, and treating the allegations as sufficient to show that Hyde & Co. made application at the District Land Office at Vancouver to select the land in question March 2, 1902, and at that time (although this is contrary to the allegation) recorded a deed conveying the base land to the Government, yet the allegations totally fail to show that by these proceedings an equitable interest in the land was acquired. The act of Congress, approved June 4, 1897, under which complainants assert their rights, provides:

> "That in cases in which a tract covered by an unperfected bona fide claim, or by a patent, is included within the limits of the public forest reservation, the settler or owner thereof may,

if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim of patent and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the land selected; Provided, further, that in cases of unperfected claims, the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

After the passage of this act the Secretary of the Interior promulgated certain rules and regulations for the purpose of carrying the same into effect, which rules are found in 24 L. D. 589, 592. These rules, among other things, provide:

"16. Where final certificate or patent is issued, it will be necessary for the entryman or owner thereunder to execute a quit claim deed to the United States, have the same recorded on the county records and furnish an abstract of title duly authenticated showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry which must be filed as required by paragraph 15 with the affidavit therein called for * * *

"18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with a report as to the status of the tract applied for."

In *Cosmos Co. vs. Gray Eagle Co.*, 190 U. S. 301, 310, *et seq.*, the Supreme Court, construing this act and these requirements, held that the local land officers had no functions to perform under this act except to forward the application to the office of the Commissioner of the General Land Office; that the filing of the papers in the District Land Office did not, and could not, make out an equitable title in the selector and that a complete equitable title was not made out and could not exist until there had been a favorable decision in the office of the Commissioner of the General Land Office regarding the sufficiency of the complainant's proof of his right to the selected land. They further held, upon the contention that the selector became the equitable owner of the land by the relinquishment of its title to the base land, that such relinquishment constituted a mere offer, and that the duty of passing upon the proofs tendered was in the Commissioner of the General Land Office and not in the district land officers, and that until the Commissioner of the General Land Office had passed upon and accepted the proofs tendered, there was no acceptance of the offer and no equitable estate created in the applicant. They say:

> "There must be a decision made somewhere regarding the rights asserted by the selector of

land under the act before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute and the selector cannot decide the question for himself. * * *

"Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms and the further fact that the Land Department had adopted Rule 18 above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector so that he became vested with the equitable title to the land he assumed to select."

See, also:

Pac. Live Stock Co. vs. Isaacs (Ore.), 96 Pac. Rep. 460, 464.

In this case the court say:

"No competent proof, however, of any relinquishment and selection by Hyde was offered, but waiving such matters and considering that such proof was offered, does that invest him with any right in or to the lands so selected as against even a mere trespasser at any time before final acceptance thereof by the Secretary of the Interior, or the issuance of a patent? Whatever right he may eventually acquire in such selected lands is not based upon a settlement thereon

> impliedly or expressly required by the Government as a condition precedent to the acquisition of title as would be the case of a homesteader pre-emptor but in its essence it is a mere exchange of lands and neither party acquires any legal or equitable title in the lands proposed to be exchanged until the acceptance or final consummation thereof."

In *U. S. vs. McClure,* 174 Fed. Rep. 510 (affirmed 187 Fed. 265), the United States Circuit Court for the District of Oregon held that the making and recording of a deed conveying base lands to the United States and the tendering of such deed to the Land Department in exchange for other lands does not pass the title to the lands offered in exchange until the deed is accepted.

> "The mere execution and recording of a deed and the tender thereof vests no title in the Government. Until the deed and title are examined and approved it is a mere assertion by the applicant of his title and right to make the selection. * * * The deed and tender thereof amounts to nothing more than an offer by the owner to exchange one tract of land for another and the title does not pass to either party until the exchange is effected."

The case of *Daniels vs. Wagner,* decided by this court on the 5th of May, 1913, and reported in vol. 205 Fed. Rep. page 235, is identical in all its essential features with the case at bar and is absolutely decisive. In that case this court decided that a

selector of lieu land in exchange for patented land within a forest reservation under the act of June 4, 1897, acquires no vested right or equitable interest in the land selected merely by the filing of deeds of relinquishment and lieu selection papers in the Land Office.

Applying these decisions to the allegations of the bill it is evident that those allegations are insufficient to show that Hyde & Co. or the complainants acquired an equitable title to the land involved in this controversy. The utmost that can be said is that they tendered a conveyance of the base lands to the Government and offered to make the exchange. It is not claimed that this offer was ever accepted. Upon the contrary it is expressly alleged in the sixth paragraph of the bill that November 21, 1902, "the Land Department of the United States promulgated a rule and order suspending all further proceedings upon entries made with any of the so-called 'Hyde Scrip', which order has never been revoked and is still in force and which order affected said second application". It appears, therefore, that Hyde & Co., or the complainants as their successors, have paid nothing to the Government for this land; that they still retain the legal title to the base land since the delivery of

the deed has never been accepted by the United States, and that they are not the equitable owners thereof.

Under these circumstances they are not in a position to assail the title which the Government of the United States has conveyed by its patent to the defendants.

In *Campbell vs. Weyerhaueser,* 161 Fed. Rep. 332, the Court of Appeals for the Eighth Circuit say:

> "In this case the complainant Campbell repeatedly filed with the Land Department his application to enter the land which he claims under those acts prior to Jan. 1st, 1898, and before the Railway Company's selection of that land was approved by the Secretary of the Interior, but the officers of the Land Department rejected his application each time and refused to permit him to enter the land. * * * One who has never by acceptance of a grant, or by settlement, and improvement, or by occupation, or by entry, or by payment, placed himself in privity with the United States in title before a patent issues to another may not maintain a bill in equity to charge the title under a patent with a trust in his favor. * * * The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant, which is superior to the legal title in the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open

to entry thereunder, is not, and no one can convert it into, such an interest in land by making an application to purchase which the officers of the land department unlawfully deny. The right to an allowance of such an application is a privilege merely, and not an equitable interest or title. The applicant acquires no equitable interest in the land by his application and its denial, and in the absence of such an interest no suit in equity can be maintained. Irreparable injury is conclusively presumed from the refusal of one to perform his contract to convey real property, and it is upon that ground that suits in equity to charge titles under patents with trusts for vendees and grantees are maintained; but there is no presumption of irreparable injury from the unlawful refusal of the Government to sell land in which the applicant has secured no equitable interest and hence such a refusal will not sustain a bill in equity. The applicant pays nothing for the tract he is refused permission to buy, his loss by the refusal is measureable in damages, he may purchase another tract, and if courts of equity should entertain suits upon such applications and denials, they would become courts for the production rather than for the prevention of a multiplicity of suits."

See, also:

Smelting Co. vs. Kemp, 104 U. S. 636, 637.

Baldwin vs. Keith, (Okla.), 75 Pac. Rep. 1124.

Loney vs. Scott, (Ore.), 112 Pac. Rep. 172, 175.

III.

Moreover, complainants are clearly guilty of laches. Patents for these lands were issued to three patentees in 1905, 1907 and 1908 respectively. The defendants Gray and wife, Barr and wife, Huston and the Milwaukee Land Company are grantees respectively of the patentees. The complaint alleges no adequate excuse for the complainants' delay until November, 1910, before commencing this action.

For the foregoing reasons we respectfully submit that the decree should be affirmed.

F. M. DUDLEY,
Attorney for Milwaukee Land Company,

PETERS & POWELL,
Attorneys for Defendants Barr and wife.

W. A. REYNOLDS,
Attorney for Defendants Gray.

C. E. MOULTON,
Attorneys for Defendants Huston.

No. 2386

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES DUNSMUIR,

Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of AUGUST E. MUENTER, Collector of Internal Revenue),

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

FILMER BROS. CO., PRINT. 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

ANDREW THORNE & WALTON C. WEBB, Esqrs., Attorneys for Plaintiff in Error, Mills Building, San Francisco, California.

JOHN W. PRESTON, United States Attorney, and EARL H. PIER, Assistant U. S. Attorney, Attorneys for Defendant in Error, U. S. Postoffice & Courthouse Building, San Francisco, California.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,

Defendant.

Complaint.

Plaintiff complains of the defendant above named and for cause of action alleges:

1. That the defendant, August E. Muenter, is now and has been since the first day of October, 1907, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, having his official place of residence in the City and County of San Francisco, State of California and Northern District of California.

2. That previous to said first day of October, 1907, when said defendant, August E. Muenter, became the duly appointed, qualified and acting Collector of Internal Revenue, as aforesaid, John C. Lynch was and had been during all the times in this complaint mentioned up to October 1st, 1907, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, having his official place of residence in the City and County of San Francisco, State of California, and Northern District of California, and was succeeded on said 1st day of October, 1907, as Collector of Internal Revenue, as aforesaid, by the defendant, August E. Muenter.

3. That on or about the 31st day of January, 1900, at the [1*] City, County and State of New York, Alexander Dunsmuir died, being a resident of Victoria, British Columbia, at the time of his death and having been a resident of said Victoria at all times, said decedent having been born in said British Columbia, and that said British Columbia was at all times the domicile of said decedent.

4. That said decedent died testate, leaving a last will and testament, dated December 21st, 1899, which by a judgment duly given, made and entered on the 24th day of February, 1900, by the Supreme Court of British Columbia (in Probate), was duly and originally proved and allowed and admitted to probate as the last will and testament of said Alexander Dunsmuir, deceased. That such judgment, and such proof, allowance and admission to probate has never

*Page-number appearing at foot of page of original certified Record.

been in whole or in part appealed from, revoked, set aside, modified or in any wise affected but that the same has become and is now absolute and final.

5. That thereafter and on, to wit, the 9th day of May, 1900, by a judgment and decree of the Superior Court of the City and County of San Francisco, State of California, a Court of competent jurisdiction, the said last will and testament of Alexander Dunsmuir, deceased, by duly authenticated copy was admitted to probate and thereafter and on, to wit, the 14th day of May, 1900, letters testamentary were duly issued by the said Superior Court to the plaintiff, James Dunsmuir. That thereafter, after due proceedings, in ancillary administration, the estate of said decedent *and* situated in the State of California was, by an order and decree, duly made, given and entered on the 3d day of June, 1901, by the said Superior Court of the City and County of San Francisco duly distributed to James Dunsmuir, the plaintiff herein, as the sole legatee named in the said last will and testament of Alexander Dunsmuir, deceased. That said decree [2] has become final and absolute. That said James Dunsmuir has now and has always had his domicile in British Columbia.

6. That the residuary personal property left by said testator by the terms of said last will as aforesaid, as estimated by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, for the purpose of the Federal Succession Tax (which estimate is for the purpose of this action asquiesced in by plaintiff) amounted in value to the sum of One Hundred Ninety-seven Thousand Nine Hundred and

Nineteen and 85/100 ($197,919.85) Dollars.

7. That on the 15th day of October, 1906, the said John C. Lynch, assuming to act as such Collector of Internal Revenue as aforesaid, and under the Acts of Congress commonly known as the "War Revenue Law," of June 13, 1898 (also known as the Federal succession tax law), did by force and duress, exact, demand and collect from said James Dunsmuir, the plaintiff herein, the sum of Two Thousand Nine Hundred Sixty-eight and 80/100 ($2968.80) Dollars, gold coin of the United States, claiming the same to be a lawful assessment under said Act on account of the legacy received by the said James Dunsmuir, the plaintiff herein, under the terms of the said last will and testament of Alexander Dunsmuir, deceased.

8. That the said tax of Two Thousand Nine Hundred Sixty-eight and 80/100 ($2968.80) Dollars was imposed and assessed by the said John C. Lynch, as the then Collector of Internal Revenue as aforesaid, on the sum of One Hundred Ninety-seven Thousand Nine Hundred Nineteen and 85/100 (197,919.85) Dollars, the same being the alleged value of the share of said estate left to the said James Dunsmuir, a brother of said Alexander Dunsmuir, deceased, and the tax of Two Thousand Nine Hundred Sixty-eight and 80/100 ($2968.80) Dollars being at the rate of One and 50/100 ($1.50) Dollars for every One Hundred [3] ($100.00) Dollars of said sum of One Hundred Ninety-seven Thousand Nine Hundred Nineteen and 85/100 ($197,919.85) Dollars.

9. That said sum of Two Thousand Nine Hundred Sixty-eight and 80/100 ($2968.80) Dollars was paid

for the personal funds of James Dunsmuir, the plaintiff herein as aforesaid, involuntarily and under protest and protesting that he, the said James Dunsmuir, the plaintiff herein, was not nor was the estate of said Alexander Dunsmuir, deceased, nor was said legatee or said legacy liable to pay said tax.

10. That at the time of the payment of said tax as aforesaid, to wit, on or about the 15th day of October, 1906, the plaintiff served upon the said John C. Lynch as such Collector of Internal Revenue, a written protest in which the grounds of protest were specified therein, to wit: That no tax was due by law from the estate of said Alexander Dunsmuir or from said James Dunsmuir as residuary legatee thereof and that the legacy to the said James Dunsmuir of the residue of said estate had no clear value, as the same was burdened with the payment of an annuity of Twenty-five Thousand (25,000.00) Dollars to the widow of said deceased; that the value of said annuity was greater than the value of said legacy; that said decedent, Alexander Dunsmuir, was a British subject; that said decedent died in the State of New York; that he was domiciled at Victoria, British Columbia, where his will was probated and that said plaintiff succeeded to said legacy under the laws of Canada.

11. That thereafter and on, to wit, the 12th day of February, 1908, the plaintiff duly filed with the defendant, August E. Muenter, Collector of Internal Revenue of the United States, of the First Collection District of California, a duly verified claim for the refunding of said tax of Two Thousand Nine

Hundred Sixty-eight and 80/100 [4] ($2968.80) Dollars, so collected as aforesaid and plaintiff then appealed to the Commissioner of Internal Revenue from the action and decision of said John C. Lynch, as the then Collector of Internal Revenue as aforesaid, in holding said legacy liable to payment of said legacy tax of Two Thousand Nine Hundred Sixty-eight and 80/100 ($2968.80) Dollars and in collecting the said legacy tax in the manner aforesaid, and plaintiff then represented to said Commissioner of Internal Revenue that the collection of said tax was unlawful and that the amount thereof should be refunded for the following reasons:

(a) That no tax is due by law from said estate of Alexander Dunsmuir, deceased, or from the said James Dunsmuir as residuary legatee thereof.

(b) That the legacy to the said James Dunsmuir, plaintiff herein, of the residue of said estate had no clear value, as the same was burdened with the payment of an annuity of Twenty-five Thousand ($25,000.00) Dollars to the widow of said deceased; and, as was found by the Honorable Finlay Cook, Appraiser of Collateral Inheritance Tax in the Matter of said estate, the value of the said annuity was greater than the value of said legacy.

(c) That the decedent, Alexander Dunsmuir, was a British subject; that he died in the State of New York; that he was domiciled at Victoria, British Columbia, where his will was probated, and that said James Dunsmuir, plaintiff herein, succeeded to said legacy under the laws of Canada and that said James Dunsmuir, plaintiff herein, was and always had been

a British subject and that he resides and always has resided in British Columbia and was domiciled and has always been domiciled in said British Columbia, and [5] further that said tax was not a valid charge upon said legacy under the ruling of the Supreme Court of the United States as set forth in the cases of Moore vs. Ruckgaber, 184 U. S. 593, and Eidman vs. Martinez, 184 U. S. 578.

12. That said plaintiff is now and at all times has been a British subject; that said decedent, Alexander Dunsmuir, was at the time of his death and was at all times a British subject.

13. That the said legacy of plaintiff from the estate of said Alexander Dunsmuir, deceased, consisted wholly of personal property and was subject to and burdened with an annuity of Twenty-five Thousand (25,000.00) Dollars in favor of the widow of said Alexander Dunsmuir, deceased; that said legacy of plaintiff had no clear or taxable value, and that said legacy had no taxable residuum.

14. That the legacy Internal Revenue Tax imposed and collected by said John C. Lynch, the then Collector of Internal Revenue, was and is illegal and erroneous and without authority of law and should be refunded.

15. That said Commissioner of Internal Revenue disallowed and rejected said claim of plaintiff for the refunding of said tax on or about the 4th day of March, 1908.

16. That no part of said tax of Two Thousand Nine Hundred Sixty-eight and 80/100 ($2968.80) Dollars has been refunded or repaid to plaintiff and

the whole of said sum of Two Thousand Nine Hundred Sixty-eight and 80/100 ($2968.80) Dollars is still unpaid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Two Thousand Nine Hundred Sixty-eight and 80/100 ($2968.80) Dollars together with interest thereon and for costs of suit.

ANDREW THORNE,
Attorney for Plaintiff. [6]

State of California,
City and County of San Francisco,—ss.

Andrew Thorne, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled action and duly authorized to appear and act for him in all matters pertaining to this action; that said plaintiff is absent from said City and County of San Francisco and from said State of California and resides without the said City and County of San Francisco, State of California, to wit, in Victoria, British Columbia; that affiant is more familiar with the facts stated in the foregoing complaint than the said plaintiff and makes this affidavit for the above reasons in the place of plaintiff; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters that are therein stated upon information or belief and as to those matters that he believes it to be true.

ANDREW THORNE.

Subscribed and sworn to before me this 2d day of April, 1908.

[Seal] NETTIE HAMILTON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 2, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,

Defendant.

Action brought in the said Circuit Court and the complaint filed in the office of the Clerk of the said Circuit Court, in the City and County of San Francisco.

ANDREW THORNE,
Attorney for Plaintiff.

Summons.

The President of the United States of America, Greeting: To AUGUST E. MUENTER, Collector of Internal Revenue, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the complaint in an action entitled as above, brought against you in the Circuit Court of

the United States, Ninth Judicial Circuit, in and for the Northern District of California, within ten days after the service on you of this Summons—if served within this county—or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 2d day of April in the year of our Lord one thousand nine hundred and eight and of our independence the 132d.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [8]

United States Marshal's Office,
Northern District of California.

I HEREBY CERTIFY that I received the within Summons on the 2d day of April, 1908, and personally served the same on the 2d day of April, 1908, upon August E. Muenter, Collector of Internal Revenue, the defendant therein named, by delivering to and leaving with B. J. Haskins, the Chief Clerk of said August E. Muenter, Collector of Internal Revenue, said Muenter at the time of this service being in Washington, D. C., and without the Jurisdiction of this Court, said defendant named therein personally at the City and County of San Francisco in said

District, a copy thereof, together with a copy of the Complaint, attached thereto.

Dated at San Francisco this 2d day of April, 1908.

C. T. ELLIOTT,
U. S. Marshal.
By J. E. Lynch,
Office Deputy.

[Endorsed]: Filed April 3d, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [9]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14,703.

JAMES DUNSMUIR

vs.

AUGUST E. MUENTER, Collector of Internal Revenue.

Demurrer.

Comes now the defendant in the above-entitled case and demurs to the complaint of plaintiff, on the ground:

I.

That the same does not state facts sufficient to constitute a cause of action against this defendant.

ROBT. T. DEVLIN,
United States Attorney,
Attorney for Defendant.

I hereby certify the foregoing demurrer is not interposed for the purpose of delay, but is interposed

in good faith, and that, in my opinion, the same is well founded in point of law.

ROBT. T. DEVLIN,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed April 10th, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

At a stated term, to wit, the July term A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Fransico, on Monday the 3d day of August, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,703.

JAMES DUNSMUIR

vs.

AUGUST E. MUENTER, Collector, etc.

Order Overruling Demurrer, etc.

Defendant's demurrer to the complaint herein came on this day to be heard and by consent of George Clark, Esq., Assistant United States Attorney, it is ordered that said demurrer be and the same is hereby overruled, with leave to the defendant to answer within forty-five days. [11]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,

Defendant.

Answer.

Comes now the defendant and answering plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I of plaintiff's complaint.

II.

Admits the allegations of paragraph II of plaintiff's complaint.

III.

As to the allegations of paragraph III of plaintiff's complaint, defendant admits that Alexander Dunsmuir died January 31st, 1900, in New York City, State of New York. Defendant has no knowledge, or information, or belief, as to the allegations of the said paragraph III that the said Dunsmuir was a resident of Victoria, B. C., at the time of his death, or that said place was his domicile at the time of his death, and placing his answer upon such ground, he denies each and all of said allegations.

IV.

As to the allegations of paragraph IV of the said

complaint [12] defendant alleges that he has no information or belief sufficient to enable him to answer said allegations, and placing his answer upon said ground, he denies each and all of the said allegations contained in the said paragraph; he denies that the said will was originally proved or was entitled to be originally proved in the Supreme Court of British Columbia.

V.

As to the allegations of paragraph V this defendant alleges that he is advised and believes, and upon information and belief does now state that the said Alexander Dunsmuir died a resident of the City and County of San Francisco, State of California, and that if ancillary administration upon the estate of said deceased was allowed by the Superior Court of the State of California, in and for the City and County of San Francisco, the same was without jurisdiction and of no effect.

VI.

Defendant admits the allegations of paragraph VI of plaintiff's complaint.

VII.

Admits the estate of the said Alexander Dunsmuir, deceased, paid the legacy tax of Two Thousand Nine Hundred Sixty-eight and 80/100 (2968.80) Dollars imposed and assessed as set forth in paragraph VII of said complaint upon the legacies of personal property mentioned and described in said paragraph VII and in said paragraph VI of the plaintiff's complaint. Defendant denies that he collected the said taxes or any portion thereof by force or duress, or by force or

duress. Defendant alleges that the taxes were voluntarily paid and that there was no force, actual or threatened, and no duress of any kind exercised by defendant in exacting, demanding or collecting the said tax. [13]

VIII.

Admits the allegations of paragraph VIII of plaintiff's complaint.

IX.

As to the allegations of paragraph IX of plaintiff's complaint, defendant alleges that he has no information or belief sufficient to enable him to answer the allegations of said complaint to the effect that the plaintiff in this action owns or has any interest in the alleged cause of action set forth in the complaint, and placing his answer upon that ground, he denies that plaintiff owns or has any interest whatever in the said alleged cause of action set forth in the complaint.

X.

Admits the allegations of paragraph X of plaintiff's complaint.

XI.

Admits the allegations of paragraph XI of plaintiff's complaint.

XII.

Defendant has no information or belief sufficient to enable him to answer the allegations of paragraph XII of said complaint, and placing his answer upon said ground, he denies each and every allegation in said paragraph contained.

XIII.

Defendant has no information or belief sufficient

to enable him to answer the allegations of paragraph XIII of said complaint, and placing his answer upon said ground, he denies each and every allegation in said paragraph contained, and denies that said legacy has no clear or taxable value, and denies that said legacy has no taxable residuum. The defendant alleges that the residuary personal property taxed by this defendant amounts to One Hundred Ninety-seven Thousand Nine Hundred Nineteen and 85/100 [14] (197,919.85) Dollars; that said sum was the clear and actual value of the said personal property passing at the death and by virtue of the will of the said deceased to the said James Dunsmuir, in immediate possession and enjoyment.

XIV.

Admits the allegations of paragraph XV of plaintiff's complaint.

XV.

Admits the allegations of paragraph XVI of plaintiff's complaint.

WHEREFORE defendant prays that defendant take nothing by this action, and for costs of suit.

ROBT. T. DEVLIN,
United States Attorney,
Attorney for Defendant. [15]

State and Northern District of California,
City and County of San Francisco,—ss.

August E. Muenter, being first duly sworn, deposes and says:

That he is the Collector of the Internal Revenue of the United States, for the First Collection District of California, and the defendant herein; that he has

read the foregoing Answer and knows the contents thereof; that the same is true except as to the matters which are therein stated on information and belief, and that as to those matters, he believes it to be true.

AUG. E. MUENTER.

Subscribed and sworn to before me this 9th day of October, 1908.

[Seal] W. B. MALING,

Deputy Clerk U. S. Circuit Court, Northern District of California.

Service of the within Answer by copy admitted this 9th day of Oct. 1908.

ANDREW THORNE,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 9, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy. [16]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector, etc.,

Defendant.

Waiver of Jury.

It is stipulated by and between the parties hereto that a jury in the above-entitled case may be, and the same is hereby waived.

Dated March 2d, 1911.

ANDREW THORNE,
Attorney for Plaintiff,
ROBT. T. DEVLIN,
Attorney for Defendant.

[Endorsed]: Filed Mar. 3, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [17]

At a stated term, to wit, the November term, A. D. 1911, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 9th day of January, in the year of our Lord one thousand nine hundred and 12. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,703.

JAMES DUNSMUIR

vs.

AUGUST E. MUENTER, Collector, etc.

Order Amending Complaint.

* * * * * * * * *

Upon motion of Mr. Thorne, it was ordered that the complaint may be amended on its face by inserting the word "alleged" before the word "value" on line 1 of page 4.

* * * * * * * * *

[18]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,

Defendant.

Judgment.

This cause having come on regularly for trial upon the 9th day of January, 1912, and on the 20th day of November, 1912, before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the attorneys for the respective parties; Andrew Thorne, Esq., appearing as attorney for the plaintiff, and Earl H. Pier, Esq., Assistant United States Attorney appearing on behalf of the defendant; and evidence, oral and documentary, on behalf of the respective parties having been introduced and closed, and the cause after arguments by the attorneys for the respective parties having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having ordered that judgment be entered herein in favor of the defendant and against the plaintiff and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the plaintiff take nothing by this action,

that defendant go hereof without day, and that defendant do have and recover of and from the plaintiff his costs herein taxed at $53.75.

Judgment entered May 12, 1913.

W. B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [19]

In the District Court of the United States for the Northern District of California.

No. 14,703.

JAMES DUNSMUIR

vs.

AUGUST E. MUENTER, Collector of Internal Revenue.

Certificate to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 12th day of May, 1913.

[Seal] W. B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed May 12, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Tuesday, the 3d day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector, etc.,

Defendant.

Order for Filing Oral Opinion Nunc Pro Tunc.

It appearing that the Oral Opinion of the Court heretofore rendered judgment herein was not filed at the date of its rendition, and that such filing should have been had;

Now, on motion of the plaintiff it is ordered that a copy of said Opinion be filed herein *nunc pro tunc* as of May 12, 1913, the date of its rendition. [20a]

In the District Court of the United States, Northern District of California, Second Division.

Hon. WM. C. VAN FLEET, Judge.

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,

Defendant.

Oral Opinion.

MONDAY, MAY 12, 1913.

ANDREW THORNE, for Plaintiff.

ROBERT T. DEVLIN, United States Attorney and EARL H. PIER, Assistant United States Attorney, for Defendant.

The COURT (Orally.)—The case of James Dunsmuir vs. August Muenter, as Collector of Internal Revenue for this District, is an action by the plaintiff to recover a certain sum paid as an inheritance tax assessed under the War Revenue Act of 1898 on property passing to him under the will of his brother, Alexander Dunsmuir. The case involves three propositions:

(1) Was the payment of the tax by the plaintiff a voluntary payment so as to preclude a recovery thereof in this action?

(2) Was the legacy passing to the plaintiff under the decree of distribution burdened with an annuity in favor of the widow of the testator, and, if so, was

the effect of this burden such as to leave no clear value of the legacy subject to be taxed under the Act? [20b]

(3) Was the domicile of Alexander Dunsmuir, the testator, at the time of his death, in this State or in British Columbia?

As to the first question, I have little, if any, doubt that the tax must be held to have been one paid involuntarily. It is true that there were no coercive measures resorted to or required, but the tax was paid under formal protest, and I am satisfied that in an action to recover under this Act that is sufficient to constitute it an involuntary payment such as to entitle the party unjustly taxed to sue and recover on establishing the fact of its not having been properly levied.

Upon the second question, whether the legacy or inheritance was encumbered by an annuity in favor of the widow of the deceased, and was therefore not susceptible of the determination of its clear value, as required by the Act in question, I am quite as well satisfied that it is not open to that objection. The will of Alexander Dunsmuir devised the property upon which the tax was levied to the plaintiff here absolutely, without condition, and without any charge upon it of any character. Alexander Dunsmuir, it seems, had made no provision by his will for his widow, whom he had married a short time before his death. She set up, or threatened, a claim against his estate, and, after negotiations, James Dunsmuir, the legatee, entered into a contract with her by which he undertook, in consideration of her waiving all claim

against the estate of the decedent, to pay her a certain annual payment,—I think it was $25,000 a year. This contract recited, it is true, that while Alexander Dunsmuir had died without making provision for his wife, nevertheless it had been understood between him and his brother, the legatee, that the latter should care for her; but there was nothing in the nature of the contract or in the circumstances under which it was made, which, in my view, [20c] constituted it a charge against the estate of the decedent. It was purely a personal, contractual obligation on the part of James Dunsmuir to make this payment to the widow during her life, in consideration of her waiver of her claim and her agreement not to attempt to secure other rights from the estate of the decedent, which under the will was devised entirely to him. The decree of distribution, while it refers incidentally to the making of this contract for the benefit of the widow, transmits the title to the property subjected to the tax to the devisee without any condition or restraint of any character; and I am satisfied that it must be held that it passed to the devisee absolutely clear, so far as the law is concerned with which we are here dealing, of any charge which would affect the ascertainment and determination of that clear value of the legacy required to make it subject to the tax.

That leaves only the third question for consideration as to the domicile of the decedent at the time of his death. As claimed, if he were domiciled in British Columbia, the property would not be subject to tax under this Act. The question as presented in the record is very largely a question of fact, and it rests

to a considerable extent, if not wholly, upon declarations appearing by the evidence to have been made by the decedent, both oral and in writing. Of the first class, the oral declarations, there is a considerable amount of testimony tending to show that Dunsmuir, who was born in Victoria, British Columbia,—where his family resided and had large interests,—lived there during a considerable part of his younger manhood, but subsequently—about 1878–9—came to San Francisco, where his fathers' house had large interests in the coal trade, of which he took the management, and where he spent a **[20d]** very considerable portion of his time. I am inclined to think that the evidence preponderates in favor of his having spent the greater portion of his time here during each year. During a great portion of that time, and up to a period very recently antedating his death, he lived in San Francisco at different periods at the Pacific Union Club, of which he was a member, at the Occidental Hotel, the Palace Hotel, and at other places, maintaining quite an establishment of apartments, and retaining those places of residence during his absences from the city as well as while here. He would go to British Columbia periodically, where doubtless his business relations called him, and would remain there for a shorter or longer period as the exigencies of his business required; and it appears that, aside from the apartments that were provided for him, when desired, in his mother's home in Victoria, he had, as well, apartments at the Driard Hotel in that city, which he maintained and kept throughout the entire year,

whether there or not. That continued to be the course of his life up to a date shortly prior to his death.

The evidence tends to show, through the statements of more or less intimate friends, that Dunsmuir was a very ardent Englishman, that he had that great love of the flag which is found to be very strongly implanted in the breasts of that race; that he scorned the idea of changing his allegiance, and that more or less frequently in conversations, in a general way, referred to Victoria, British Columbia, as his home. The statements from these witnesses, however, in large part relate to the earlier period of his residence in San Francisco. But along toward the latter part of his residence in this State he maintained an establishment in San Leandro, in Alameda County, where the lady whom he subsequently married had her residence, and was there a great deal of the time. Shortly previous [20e] to his death he married this lady and in connection with the preparations and discussion of his purpose he referred to San Leandro as his home.

It also appears that some years prior to his death the corporation known as R. Dunsmuir Sons, wholesale dealers in and importers of coal here, was organized, and Alexander Dunsmuir became one of the incorporators of that corporation. In the articles of incorporation it is recited that his residence is San Francisco, and those articles of incorporation, as required by the law, were acknowledged and verified before a notary public.

Subsequently when his will was drawn, which was

a short time previous to his death, it was recited in the opening clause, not that his residence was in San Francisco, but language which imported that fact. The will recites, in the usual form, "I, Alexander Dunsmuir, of San Francisco," etc.

When his marriage license was taken out the declaration made as to his residence was as being in Alameda County. In both the registry of the church where he was married, and in the certificate of marriage, his residence is given as Alameda County.

Now, the question arises under evidence of this character, what was the domicile of the decedent? Of course domicile is not entirely synonymous with residence, but the two are interchangeably used in common parlance, and, of course, while a man may have a domicile separate and apart from his residence, the fact not being made clear to the contrary, his domicile is presumed to follow his residence. This is especially true where it is maintained for a considerable period and under circumstances such as are here developed, disclosing large business interests at the place of residence. I have given the entire record a very careful examination, [20f] and I have reached the conclusion that I cannot ignore the repeated declarations made under the most solemn circumstances, such as the recital in the articles of incorporation of the corporation of which the decedent became a director, and in that more solemn form found in his will, and as well the declarations contained in his marriage license, as also in his marriage certificate. The significance and force of these recitals cannot be lightly cast aside, and I feel driven to the conclusion

that the evidence preponderates in favor of the conclusion that Dunsmuir must be regarded as having been domiciled in California at the time of his death.

Counsel for the plaintiff undertakes to belittle the character of these more formal declarations in these several writings. It appears that in the marriage license deceased's residence was given as San Leandro, whereas in the marriage certificate and in the registry of the church where the marriage took place it was given merely as Alameda County, and, as further urged, the recital in the will is that his residence is San Francisco. But I set very little store and attach very little significance to these somewhat insignificant differences in the designation of his particular point of residence. The fact remains, and which I think is the main consideration, that the points referred to were all within this State, and must be taken as having evidenced the purpose of the decedent to declare himself a resident domiciled within the State.

In view of this conclusion the tax must be held to have been competently levied. The judgment will accordingly go for the defendant for its costs.

[Endorsed]: Filed Mar. 3, 1914, *nunc pro tunc,* May 12, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [**20g**]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of AUGUST E. MUENTER, Collector of Internal Revenue),

Defendant.

Substitution of Defendant.

WHEREAS, Joseph J. Scott, has been appointed Collector of Internal Revenue of the United States for the First Collection District of California, in the place and stead of August E. Muenter, and is now the duly, appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, having his official place of residence in the City and County of San Francisco, State of California, and Northern District of California;

NOW, THEREFORE, it is hereby stipulated and agreed that said Joseph J. Scott, as such collector, be, and he is hereby substituted as defendant in the above-entitled action in the place of said August E. Muenter.

Dated this 26th day of September, 1913.

ANDREW THORNE,
Attorney for Plaintiff.
BENJ. L. McKINLEY,
United States Attorney,
Attorney for Joseph J. Scott, Collector of Internal Revenue (Substituted in Place of August E. Muenter, Collector of Internal Revenue), Defendant. [20h]

In accordance with the foregoing stipulation it is hereby ordered that Joseph J. Scott, as Collector of Internal Revenue of the United States for the First Collection District of California, be, and he is hereby, substituted as defendant in the above-entitled action in the place of August E. Muenter and that this action be, and the same is hereby, continued against Joseph J. Scott, as such collector, defendant.

Dated: September 27th, 1913.

WM. C. VAN FLEET,
Judge.

Received a copy of the within this 27th day of September, 1913.

BENJ. L. McKINLEY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Sep. 27, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20i]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of AUGUST E. MUENTER, Collector of Internal Revenue),

Defendant.

Bill of Exceptions.

TO BE USED ON APPEAL FROM THE JUDGMENT HEREIN BY WRIT OF ERROR SUED OUT BY THE PLAINTIFF HEREIN TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH JUDICIAL CIRCUIT.

The trial of the above-entitled cause was begun on January 9th, 1912, before the Court sitting without a jury, a jury having been duly waived by the parties thereto, Andrew Thorne, Esq., appearing as attorney for the plaintiff, and Robert T. Devlin, United States Attorney, appearing as attorney for defendant.

The trial of said cause was concluded on the 20th day of November, 1912, and on the 12th day of May, 1913, the Court rendered Judgment in said cause adjudging that plaintiff take nothing thereby and that the defendant have and recover of and from the

plaintiff his costs of suit, which judgment was entered on the 12th day of May, 1913.

At the trial of said cause the following proceedings were had:

Counsel for plaintiff offered in evidence an exemplified copy of the decree of settlement of final account and [21] final distribution in the matter of the estate of Alexander Dunsmuir, deceased, in the Superior Court of the State of California, in and for the City and County of San Francisco, which was admitted in evidence and marked Plaintiff's Exhibit No. 1, same being admitted for what it is worth, it not being admitted to prove the residence of the deceased at the time of his death, nor as fixing the taxable value of the property, nor as evidence of any recital in reference to the contract, Plaintiff's Exhibit 4 as a moving consideration.

Said document reads as follows:

Plaintiff's Exhibit No. 1—Decree of Superior Court.

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

DEPARTMENT 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

DECREE OF SETTLEMENT OF FINAL ACCOUNT AND OF FINAL DISTRIBUTION.

James Dunsmuir, as Executor of the Last Will and Testament of Alexander Dunsmuir, deceased, in and for the State of California, having on the 23d day of May, 1901, rendered and filed herein a final account and report of his administration of said

Estate in the State of California, which said account was for a final settlement, and said James Dunsmuir, as Executor as aforesaid, having filed with said account a petition for the final distribution of said Estate, and said account and petition having on the 3d day of June, 1901, come on regularly to be [22] heard due proof having been made to the satisfaction of the Court that notice had been given of the settlement of said account and of the hearing of said petition in the manner and for the time required by law;

And it appearing that said account of said Executor as rendered and filed herein is in all respects true and correct and that it is supported by proper vouchers;

That the said residue of money in the hands of said Executor belonging to the Estate of said deceased at the time of filing said final account was the sum of $25,120.70, gold coin of the United States;

That since the rendition of said final account said Executor has not received to or for the use or benefit of said estate any additional sum of money or property whatever and has not made any disbursements whatever for the account of said Estate, and that for that reason he has not presented or filed herein any account supplemental to his said final account so heretofore rendered and filed herein;

That the sum of $6,595.15 has been heretofore expended by him as necessary expenses of administration, the vouchers whereof together with a statement of such disbursements have been presented and filed, and said statement is now settled and allowed and all of said payments are hereby approved by this Court;

And it appearing that all claims and debts against said decedent and said Estate and all taxes against said Estate have been fully paid and discharged;

That said testator, Alexander Dunsmuir, died on the 31st day of January, 1900, at the City, County and State of New York, and at the time of his death he was a British subject [23] and a resident of and domiciled at Victoria, Province of British Columbia, but temporarily residing in the City and County of San Francisco, as appears from the evidence, both oral and documentary, introduced upon the hearing of the petition for distribution, and that said testator at the time of his death left property in the City and County of San Francisco, State of California;

That said Alexander Dunsmuir left a Last Will and Testament dated December 21st, A. D. 1899, wherein the said James Dunsmuir was appointed the Executor thereof;

That said Last Will and Testament of said Alexander Dunsmuir, deceased, was duly approved, allowed and admitted to probate in the Province of British Columbia by a judgment and decree dated February 26th, 1900, in the Supreme Court of British Columbia, and that said Last Will and Testament was executed according to the laws of the State of California, and also according to the law of the domicile of said testator.

And it appearing that said judgment and proof, allowance and admission to probate of said Last Will and Testament of said deceased in said Province of British Columbia has never been in whole or

in part appealed from, revoked, set aside, modified or in any wise affected or at all, but that the same has become and is now absolute;

That the aforesaid Supreme Court of British Columbia was at all the times herein mentioned and is a court of competent and general jurisdiction and was at all said times and is a court of competent jurisdiction in the premises to pronounce, give and make such decree and the proof, allowance and admission to probate of the aforesaid will so duly and regularly given and made on the 26th day of February, 1900, and that said court [24] was and is the domiciliary forum in the premises;

That on the 26th day of April, A. D. 1900, said James Dunsmuir, the person named in said Will as Executor thereof and a person interested in said Will produced and filed in this Court a copy of the Will of said Alexander Dunsmuir, deceased, and the probate thereof, duly authenticated, together with his petition for the issuance to him of letters testamentary thereon;

That thereafter such proceedings were had and taken in this Court in the matter of said Estate of said deceased that on or about the 9th day of May, 1900, it was ordered, adjudged and decreed by the judgment and decree of this Court that said copy of the Will of said Alexander Dunsmuir, deceased, and the probate thereof so duly authenticated and produced and filed in this Court on the 24th day of April, 1900, as aforesaid, be admitted to probate as the last Will and Testament of said Alexander Dunsmuir, deceased, with the same force and effect

as if said Will had been first admitted to probate in this State, and that such judgment and decree was regularly given and made;

That by virtue of said judgment and decree last aforesaid letters testamentary were ordered to be issued to said James Dunsmuir upon his giving a bond in the sum of $308,000 as required by law and that thereafter on the 14th day of May, 1900, letters testamentary were duly issued to said James Dunsmuir, as Executor as aforesaid;

That said James Dunsmuir did give said bond so required of him by law for the faithful performance and execution of the duties of the trust as such Executor, with sufficient surety; [25]

That said bond was in the manner and form and duly approved as required by law and that said James Dunsmuir duly qualified as such Executor and entered upon the discharge of his duties as such and that ever since said time has been and now is the sole Executor of the said Last Will and Testament of said deceased in and for the State of California;

That immediately after his said appointment and qualification as Executor as aforesaid he caused to be published in a newspaper of general circulation printed, published and circulated in said City and County of San Francisco, a notice to the creditors of said decedent and all persons having claims against said Alexander Dunsmuir to exhibit and present their said claims against the said deceased according to law;

That more than ten months have elapsed since

the first publication of said notice to creditors;

That a decree showing due and legal notice to the creditors of and all persons having claims against said decedent and his said Estate has been heretofore duly and regularly given, made and entered by this Court;

That all debts of said deceased and of said Estate and all expenses of administration thereof and all taxes that have attached to or accrued against said Estate and its property have been paid and discharged and that said Estate is now in a condition to be closed.

And it appearing in and by the terms of said Last Will and Testament of said deceased that all the estate and property of the said deceased, both real and personal, wheresoever, situated, was given, devised and bequeathed to James Dunsmuir, a brother of said deceased.

And it appearing to the satisfaction of this Court that said Alexander Dunsmuir, deceased, at the time of his death left him surviving as his only heirs at law the following **[26]** persons, that is to say:

Josephine Dunsmuir, widow of said deceased, and

Joan Olive Dunsmuir, mother of said deceased;

That said James Dunsmuir, as Executor as aforesaid, has this day filed in this Court in writing his waiver and renunciation of all commissons and compensation for his services as such Executor and has also made such waiver and renunciation in open court at this hearing;

And it appearing that said Alexander Dunsmuir devised and bequeathed all of his property to his

brother, James Dunsmuir, but according to previous understanding and agreement said James Dunsmuir, was to make suitable provision for said Josephine Dunsmuir, widow as aforesaid, during her life;

And it appearing that the said James Dunsmuir has since the death of said Alexander Dunsmuir in furtherance of said previous understanding and agreement entered into an agreement with the said Josephine Dunsmuir, in full settlement of her claims as widow upon the Estate of said decedent, whereby he has bound himself to pay her an annuity during her lifetime.

And it appearing by the report of the Hon. Finlay Cook, the appraiser appointed by this Court to appraise all interests in this estate subject to the collateral inheritance tax, that the present cash value of the annuity for the benefit of the said Josephine Dunsmuir, widow, as aforesaid, is in excess of the value of the property passing to James Dunsmuir, and that therefore, the property passing to said James Dunsmuir is not subject to the payment of any collateral inheritance tax; **[27]**

It is now, therefore, ordered that out of and from the rest, residue and remainder of the property now remaining in the hands of said James Dunsmuir, as Executor as aforesaid, there be paid the following sums of money, that is to say;

For estimated expenses of closing the said Estate of said deceased, five dollars:

To Messrs. Wilson & Wilson, as attorneys for said Executor in the administration of said estate the

sum of five thousand dollars, to be paid to them in full for all professional services rendered in said Estate and to said Executor as such to the date hereof, leaving a balance of $20,115.70 now in the hands of said Executor belonging to said Estate;

And it appearing to the satisfaction of this Court that said Estate is now in a condition to be closed and finally distributed to the persons lawfully entitled thereto;

Now, therefore, it is ordered, adjudged and decreed that said final account of said James Dunsmuir, as Executor of the Last Will and Testament of said Alexander Dunsmuir, deceased, be and the same is hereby settled, allowed and approved as presented and filed herein.

It is further ordered, adjudged and decreed that all the rest, residue and remainder of said Estate hereinafter particularly described and any other property known or not known or discovered which may belong to the said Estate of said Alexander Dunsmuir, deceased, or in which said Estate may have any interest, be and the same is hereby distributed to James Dunsmuir, said brother of said deceased, and that the same is not subject to the payment of any collateral inheritance tax:

The following is a particular of the said residue **[28]** of said estate referred to in this decree and of which distribution is now ordered, as aforesaid, that is to say:

Twenty thousand one hundred and fifteen dollars and seventy cents in cash;

Four thousand nine hundred and ninety-eight

shares of the capital stock of the R. Dunsmuir's Sons' Company, a corporation organized and existing under the laws of the State of California.

Done in open court this 3d day of June, A. D. 1901.

JAS. M. TROUT,
Judge.

Recorded October 3d, 1901.

[Endorsed]: Filed Jun. 3, 1901. Wm. A. Deane, Clerk. By V. F. Northrop, Deputy Clerk.

WM. A. DEANE,
Clerk.
By V. F. Northrop,
Deputy Clerk.

Office of the County Clerk,
Of the City and County of San Francisco.

I, Wm. A. Deane, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the decree of settlement of account and of final distribution in the matter of the Estate of Alexander Dunsmuir, deceased, now on file and of record in my office.

Witness my hand and the seal of said Court, this 3d day of June, A. D. 1901.

[Seal] WM. A. DEANE,
Clerk.
By V. F. Northrop,
Deputy Clerk.

Recorded Oct. 3d, 1901. **[29]**

In the Superior Court of the State of California, in and for the City and County of San Francisco.

DEPARTMENT NO. TEN—PROBATE.

No. 240—N. S.

In the Matter of the Estate of ALEXANDER DUNSMUIR,

Deceased.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify the foregoing to be a full, true and correct copy of the original Decree of settlement of final account and of final distribution, on file and of record in my office in the above-entitled matter. That the same constitute a full and complete exemplification of the said above-named decree in the same matter, and of the whole thereof.

All of which I have caused to be exemplified according to the Act of Congress.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this fourth day of January, 1912. *190*

[Seal] H. I. MULCREVY,

County Clerk and ex-officio Clerk of the Superior Court.

I, E. P. Mogan, Presiding Judge of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that said Court is a Court of Record having a Clerk and

Seal. That H. I. Mulcrevy, who has signed the annexed attestation, is the duly elected and [30] qualified County Clerk of the City and County of San Francisco, and was, at the time of signing said attestation, ex-officio Clerk of said Superior Court. That said signature is his genuine handwriting, and that all his official acts, as such Clerk, are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this Fourth day of January, 1912. A. D. *190*

E. P. MOGAN,
Presiding Judge of the said Superior Court.

State of California,
City and County of San Francisco,—ss.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that the Honorable E. P. Mogan, whose name is subscribed to the preceding certificate, is presiding Judge of the Superior Court of the State of California, in and for the City and County of San Francisco, duly elected and qualified, and that the signature of said Judge to said certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, this fourth day of January, 1912, A. D. *190*

[Seal] H. I. MULCREVY,
County Clerk and Clerk of the Superior Court."

[Testimony of Mountford S. Wilson, for Plaintiff.]

MOUNTFORD S. WILSON, called as a witness for plaintiff, after being duly sworn, testified as follows:

I am an attorney at law and have been practicing here a number of years. I knew Josephine Dunsmuir and also [31] James Dunsmuir. I recognize the agreement which is now handed to me (witness being handed Plaintiff's Exhibit No. 4, which is agreement between James Dunsmuir and Josephine Dunsmuir, dated December 1st, 1900). That agreement was signed by Josephine Dunsmuir and James Dunsmuir. I had a number of interviews with James Dunsmuir.

"Mr. THORNE (Counsel for Plaintiff).—Q. Mr. Wilson, you stated just now that Mrs. Dunsmuir was dissatisfied with some arrangement that Mr. Alexander Dunsmuir and Mr. James Dunsmuir had with reference to her support; did she want more? A. Yes. Q. Did you tell James Dunsmuir that? A. Yes."

As a result of these interviews the said agreement was consummated. I know the residence of James Dunsmuir. He was a resident of Victoria, British Columbia. I know the residence of Alexander Dunsmuir. He was a resident of Victoria, British Columbia.

On cross-examination the witness testified as follows:

I knew Alexander Dunsmuir for about ten years before he died. I think his rooms were mostly in

(Testimony of Mountford S. Wilson.)

the Pacific Union Club. I am not certain whether or not he lived in the old Grand Hotel for a while. He had a business here and was the manager of Robert Dunsmuir & Sons. He spent the greater part of his time in this State. He was the manager of the coal business of Dunsmuir and Sons. I do not know how long he had been manager. During the latter part of his life he bought a place, something like fifty or one hundred acres, at San Leandro and gave it to his wife. He built a house on this property. I should say the cost of the house was $30,000 or $40,000.

On redirect examination the witness testified as follows: [32]

I have been up to Victoria and have seen James Dunsmuir there. The bulk of the Dunsmuir business consists of coal mines and large tracts of land in British Columbia. The business of the Dunsmuirs down here in San Francisco was merely a sales agency for their coal and a branch of their business. The house at San Leandro, about which I have spoken, was built for a Mrs. Wallace who subsequently became his wife just before his death. The title to the whole property was taken in the name of Mrs. Wallace. I presume they lived there together but she was not his wife at the time the conveyance was made. They were living together many years before they married. He married her six weeks before he died.

[Testimony of Albert W. Mowbray, for Plaintiff.]

ALBERT W. MOWBRAY, called as a witness for plaintiff, after being duly sworn, and after duly qualifying as an expert, testified as follows:

I am a consulting actuary.

Mr. THORNE (Counsel for Plaintiff):

Q. Assuming a person to be 49 years and one month, on the 31st day of January, 1900, what would be the present value of an annuity of *$25,00* per year, payable in monthly installments during the life of that annuity?

The COURT.—During her expectancy?

Mr. THORNE.—Yes, sir.

A. Assuming that mortality follows the combined experience table of mortality, which is the table provided by the law of the State of California for inheritance tax appraisals, and the rate of interest was in that statute 5 per cent, the present value of an annuity of $25,000 per annum, payable monthly, the first payment immediately, during the continuance [33] of the life of a party aged 49 years, nearest birthday, would be $302,607.50.

Mr. THORNE.—Q. What table did you refer to?

A. The combined or Actuaries Experience Table of Mortality, and 5 per cent interest, which is the basis prescribed by the inheritance tax law of the State of California. An annuity for $25,000.00 payable monthly, to a party aged 49 years, nearest birthday, according to the Combined Experience Table of Mortality, 6 per cent interest, the present value would be $277,422.50. The same annuity, the same mor-

(Testimony of Albert W. Mowbray.)

tality experience, but a 7 per cent interest rate, the present value would be $255,685.

On cross-examination the witness testified as follows:

Mr. PIER.—Q. What is the usual rate of interest used by insurance companies in calculating annuities?

A. They usually use not higher than 3½ per cent. I think generally 3 per cent. They also use a table which shows a very much longer life than the Actuaries Experience Table because their experience with the annuities is that the class of people generally who take annuities are long-lived people; and they also take a low rate of interest because they want a rate of interest low enough so that they will not fail in carrying out their contracts.

Q. Why should they use such a low percentage as 3 per cent?

A. Insurance companies have to sustain the test of the various States for solvency, for one thing, and the highest rate I know of that is allowed in a test of solvency is 3½ per cent. The annuity business, due to the particularly long life of annuities, has generally been at least not a profitable business, and the lower the rate of interest the [34] higher the value of the annuities, so they want to increase their charges for annuities. A great many of the annuities in American companies are sold in Europe where the returns on investments are low and the rate they have to compete with corresponds.

[Testimony of Walter A. Gompertz, for Plaintiff.]

WALTER A. GOMPERTZ, called as a witness for plaintiff, after being duly sworn, testified as follows:

I know Mr. James Dunsmuir, the plaintiff in this action, and I have known him for twenty-two years. I have had business connections with him. I was employed in the office here in San Francisco for twenty-two years in various capacities. For about one year and a half or two years preceding the death of Josephine Dunsmuir I placed to her credit in the old London and San Francisco Bank about the sum of $2,000.00 each month, which sums were paid out of the funds of James Dunsmuir.

As the agent of James Dunsmuir I received a notice to pay the inheritance tax addressed to Mr. Dunsmuir from Mr. John C. Lynch, as Collector of Internal Revenue of this District. This notice which is handed to me is the notice (the witness being handed Plaintiff's Exhibit No. 2, which is demand for payment of tax).

Counsel for plaintiff offered in evidence said demand for payment of tax, which was admitted in evidence and marked Plaintiff's Exhibit No. 2. Said document reads as follows:

[Plaintiff's Exhibit No. 2—Notice of and Demand for Taxes Assessed.]

"James Dunsmuir Executor—Victoria. Duplicate.

NOTICE OF AND DEMAND FOR TAXES ASSESSED.

UNITED STATES INTERNAL REVENUE, OFFICE OF THE COLLECTOR OF INTERNAL REVENUE.

First District, State of California, October 4th, 1906.

List for Month of August, 1906.

Div.— [35]

M. Estate of Alexander Dunsmuir,
San Francisco.

You are hereby notified that a tax, under the Internal Revenue Laws of the United States, amounting to $2,968 80/100 Dollars, the same being a tax upon legacies, has been assessed against you by the Commissioner of Internal Revenue, and transmitted by him to me for collection. Demand is hereby made for this tax. This tax is due and payable on or before the 15th day of October, and unless paid within ten days after this notice and demand it will become my duty to collect the same with a penalty of five per centum additional, and interest at one per centum per month.

Payment may be made to John C. Lynch at San Francisco.

JNO. C. LYNCH,
Collector.

WILSON & WILSON, Attys.,
1860 Webster.

Bring this notice with you."

Counsel for plaintiff then offered in evidence protest on payment of tax, which was admitted in evidence and marked Plaintiff's Exhibit No. 3. Said document reads as follows:

[Plaintiff's Exhibit No. 3—Protest on Payment of Tax, Dated October 15, 1906.]

"San Francisco, Cal., October 15th, 1906.

John C. Lynch, Esq.,
Collector of Internal Revenue,
First District of California.

Dear Sir:—

In paying you herewith the sum of $2,968.50, claimed by you to be due for a tax on legacies in the Matter of the Estate of Alexander Dunsmuir, deceased, I make said payment under protest and solely to avoid the collection of said amount by compulsory process, with added penalties, as threatened by you in your Notice and demand for Taxes [36] assessed, dated October 4th, 1906. The ground of said protest are:

1. That no tax is due by law from said Estate or from myself as residuary legatee thereof.

2. That legacy to myself of the residue of said Estate had no clear value, as the same was burdened

(Testimony of Walter A. Gompertz.)

with the payment of an annuity of $25,000 to the widow of said deceased; and, as was found by Hon. Finlay Cook, Appraiser of Collateral Inheritance Tax, in the matter of said Estate, the value of the annuity was greater than the value of the legacy.

3. Alexander Dunsmuir, said deceased, was a British subject; he died in the State of New York; he was domiciled at Victoria, B. C., where his will was probated, and I succeeded to said legacy under the laws of Canada.

Yours respectfully,

JAMES DUNSMUIR,

By WALTER A. GOMPERTZ,

Agent."

The witness, continuing, testified as follows:

Mr. THORNE (Counsel for Plaintiff):

Q. Did you pay that tax, Mr. Gompertz?

A. Yes, sir.

Q. As the agent of James Dunsmuir?

A. Yes, sir.

Q. And from his personal funds? A. Yes, sir.

Q. You knew Alexander Dunsmuir, in his lifetime, did you not? A. Yes, sir.

Q. How many years did you know him?

A. 10 years.

Q. Did you know of what place he was a resident at the time of his death?

A. Victoria, British Columbia.

Q. How do you know that? A. He said so.

Q. He told you so?

A. Yes, in this way—that he wanted his name to

(Testimony of Walter A. Gompertz.)

be put in the Directory as President of R. Dunsmuir's [37] Sons Company of San Francisco, residing in Victoria, British Columbia.

Q. And do you know whether that was put in the Directories of San Francisco, the fact that he was a resident of Victoria, British Columbia.

A. Yes, sir.

The COURT.—Q. He actually lived in this State during that time, did he not?

A. He was here off and on.

Q. Well, he was here the most of the time, was he not? A. No, sir.

Q. Did he not live at the Pacific Union Club most of the time?

A. He lived there for a while, but he was in Victoria the greatest portion of the time. He was east a good many times, also.

The WITNESS.—Oh, he was here for 2 or 3 months or 6 months and then he would go away.

The WITNESS.—And he went to Europe for a year.

Mr. THORNE.—Q. Do you know what property Alexander Dunsmuir was interested in or had an interest in?

A. He was interested in the Wellington Collieries, the Esquimalt & Iron Railway, the Union Collieries of British Columbia and the R. Dunsmuir's Sons' Company of San Francisco, that is, so far as I know.

Q. And were there railways he was *interest* in?

A. Yes, the Esquimalt & Iron Railway.

Q. His interests in British Columbia were very

(Testimony of Walter A. Gompertz.)

large, were they not? A. Yes, sir.

Q. What was the nature of the business of R. Dunsmuir's & Sons' Company of San Francisco?

A. They were wholesalers of coal. They handled the products of the mines of the Wellington Colliery Company. **[38]**

Q. That is, so far as sales in San Francisco were concerned? A. Yes, sir.

Q. And this agency was merely a selling agency of the mines in British Columbia?

A. Of the product, yes, that is what you can call it, the selling agency. He had no ships, or anything like that.

The COURT.—Q. Selling and distributing—that is, you sold to the trade here? A. Yes, sir.

Mr. THORNE.—But all of his property was in British Columbia, was it not? A. Yes, sir.

(Witness Continued:) At all the times I have been speaking of James Dunsmuir resided in Victoria and resides there now. He is a British subject and is Premier and Lieutenant-Governor there. I have visited his home there. He lived with his mother and sisters in Victoria. When Alexander Dunsmuir went to Victoria I do not know where he stayed. I have heard that he stayed with his mother, but he never told me. Alexander Dunsmuir told me when he spoke of putting his name in the directory that he was a British subject and resided at Victoria, and that that was the way he wanted it in the directory. I visited Alexander Dunsmuir at the

(Testimony of Walter A. Gompertz.)

place where he dwelled in San Francisco.

Mr. THORNE (Counsel for Plaintiff):

Q. Did he have a home in San Francisco?

A. Well, no; it was places where he stopped at the Pacific Union Club, at the Grand Hotel and at the Occidental. When he was in San Francisco he stayed at clubs and hotels. I am familiar with the signature of Alexander Dunsmuir and can identify it.

(Witness being here shown Plaintiff's Exhibit No. 5, being page from register of the Hotel Imperial, continued:) [39] I find the signature of Alexander Dunsmuir on this paper. The following entry thereon is in his handwriting:

"Alex. Dunsmuir, wife & maid, Victoria, B. C."

Counsel for plaintiff then offered in evidence the directories of the City and County of San Francisco for the years 1897, 1898 and 1899, for the purpose of showing the residence of Alexander Dunsmuir as Victoria, British Columbia. Said directories were admitted and read in evidence. Each of said directories contain the following entry: "Alexander Dunsmuir, President R. Dunsmuir's Sons Co., 340 Stuart Street, R. Victoria, B. C." Upon request of counsel for defendant it was then admitted that the directories of the City and County of San Francisco for the years 1882 to 1891, inclusive, state the residence of Alexander Dunsmuir as being the "Pacific Union Club, San Francisco," and that the directories for the years 1894 to 1895 state the residence of Alexander Dunsmuir as being the "Bohemian Club."

(Testimony of Walter A. Gompertz.)

Upon request of counsel for plaintiff it was admitted that the directories of said City and County of San Francisco for the years 1892 and 1896 state the residence of Alexander Dunsmuir as being "Victoria, British Columbia."

On cross-examination the witness testified as follows:

About the years 1892, 1893, 1894 and 1895, Alexander Dunsmuir made the statements to me which I have spoken of, in regard to putting his name in the directories. He died January 31st, 1900. Besides living at the Pacific Union Club he lived at the Occidental Hotel and the Grand Hotel and in San Leandro.

Mr. PIER (Counsel for Defendant):

Q. About how much of the time each year would he spend home? I mean in Victoria. **[40]**

A. I could not say that he was always in Victoria when he was not here.

Q. How much of the time each year would he probably spend here?

A. Oh, I should say 4 or 5 or 6 months at a time. He was very fond of hunting and fishing, and used to go away on those trips up north a great deal. Sometimes he would only stay here for a week at a time. His mother died after he did. I think Mr. Dunsmuir had four rooms in the Grand Hotel. I would not be positive as to the number of rooms he had at the Occidental, but he had more than one. In regard to placing Mr. Dunsmuir's name in the directory, I don't remember now how many conversations

(Testimony of Walter A. Gompertz.)

I had with him. I can't remember whether I had more than one.

Mr. PIER. (Counsel for Defendant):

Q. When did you first begin having charge of placing the names of the members of the company in the directory?

A. I could not say exactly the years.

The COURT.—Q. Can you recall when you had the conversation that you say you had with Mr. Dunsmuir on the subject, what year that was?

A. I should say that that was in 1896, at the time of the incorporation of the company, to the best of my recollection.

Mr. PIER.—Q. Will you relate the circumstances to the court under which you had this conversation with Mr. Dunsmuir in which he directed his residence be made Victoria, British Columbia?

A. As I recollect it, it was at the time of the forming of the corporation in 1896, and that is the way he wanted his name put in the directory as President of the R. Dunsmuir Sons' Company. Now, the time and the place and the circumstances are not clear. **[41]**

Q. What was his business before that time?

A. The firm was under the name of R. Dunsmuir & Sons. His mother was the firm of R. Dunsmuir & Sons.

The COURT.—It was an unincorporated association?

A. Unincorporated, yes, and Mr. Dunsmuir and his brother made arrangements with his mother

(Testimony of Walter A. Gompertz.)

whereby they incorporated the San Francisco business.

Q. The parent business was in Victoria, was it?

A. Yes.

Q. That was not incorporated? A. No.

Q. The ancestral residence was also in Victoria, was it? A. Yes.

Q. Was Mr. Dunsmuir born in Victoria?

A. No, I think not. I think he was born in Nanaimo, on Vancouver Island.

Mr. PIER.—Q. Now, do you know how his name appeared in the directories before that time?

A. No, I do not know.

Q. Did you take any trouble to look up the directories prior to 1898? A. No, sir.

Q. Do you know that in the directory of 1886 that he gave his residence as Pacific-Union Club?

A. I do not know.

Q. And 1887 that he gave his residence as the Pacific-Union Club, and 1888 and 1889 and 1890 and 1891 and 1894, that his residence was given as the Bohemian Club, and 1895 as 340 Steiner Street?

A. I don't know that. I would like to say that I never saw the directories until this morning, when we looked at them to see his name in them.

Counsel for plaintiff offered in evidence an exemplified copy of the report and appraisement of the appraiser of collateral inheritance taxes in the matter of the estate of Alexander Dunsmuir, in the Superior Court of the State of California, in and for the

City and County of San Francisco, which reads as follows: [42]

[Exhibit—Report and Appraisement of Appraiser of Collateral Inheritances.]

"In the Superior Court of the City and County of San Francisco, State of California.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

No. 23,158—Department No. 10.

REPORT AND APPRAISEMENT OF APPRAISER OF COLLATERAL INHERITANCES.

To the Honourable the Superior Court of the City and County of San Francisco, State of California, Department No. 10.

I beg respectfully to submit the following report:

1. ORDER APPOINTING APPRAISER.

On the 25th day of June, 1900, your Honourable Court by its order duly made, entered and filed that day appointed the undersigned Appraiser to appraise all interests herein subject to Collateral Inheritance Tax, the said order directing said Appraiser 'to make a report thereof in writing to the Court, together with such other facts in relation thereof as said Court may by order require, and particularly any facts in relation to the said matter which may come to his knowledge and which may tend to assist the Court in determining what interests herein are subject to the said tax, and in assessing and fixing the market value of any interest in said estate sub-

ject to said tax,' and furthermore, 'to include in his said report a complete list of all interests in the said estate showing in the case of each whether it is in his opinion subject to Collateral Inheritance tax, with the reasons for his said opinion, and the facts and authorities upon which he bases such opinion.' (See exhibit F, annexed.)

2. OATH AND NOTICE.

My oath as such Appraiser is attached hereto and made a part hereof. See exhibit A, subjoined.

In conformity with the provisions of the Act establishing [43] the collateral inheritance tax, and pursuant to the order appointing me appraiser, I gave notice by mail to all interested parties of the time and place appointed for the appraisement. A copy of this notice showing to whom it was sent is attached hereto, marked exhibit B.

At the time mentioned in this notice the only persons appearing were Messrs. Wilson & Wilson attorneys for the executor and sole legatee.

By consent further proceedings were postponed until final distribution.

3. APPRAISEMENT OF PROPERTY.

The executor having filed his final account and petition for final distribution on the 23d day of May, 1901, proceedings in the matter of the collateral inheritance tax were thereupon resumed.

As shown by the inventory on file herein and by the final account of the executor, the property of the estate coming into the hands of the executor consists of money amounting to $4,918.35 and 4,998 shares of

the capital stock of the Robert Dunsmuir's Sons Company, a corporation, organized and existing under the laws of the State of California.

To fix the value of these shares of stock, I have taken as a basis the statement of the assets and liabilities of the corporation furnished to me by the officers thereof.

The assets consist of moneys, credits (book accounts) and real estate situated in San Francisco. The liabilities consist of debts owing in the ordinary course of the corporation's business.

Upon personal inspection of the tangible property of the corporation and upon taking expert advice as to the value [44] of the real estate, and making due allowance for all debts and expenses of administration, as shown and provided for in the final account filed herein, I am of the opinion that the net marked value of all the property of this estate, including the moneys in the hands of the executor, should be fixed at the sum of Two hundred thousand (200,000) dollars.

4. THE WILL.

A copy of the last will and testament of the decedent is attached thereto marked exhibit C, and made a part hereof.

By this will the entire estate is given to James Dunsmuir, brother of testator.

Under the law in force at testator's death, the collateral inheritance tax is collectible on property passing to a brother of a testator.

See Statutes of 1899, Chap. LXXXV, page 101.

5. THE AGREEMENT WITH DECEDENT'S WIDOW.

Evidence has been submitted to me showing clearly enough that the testator left a widow surviving him, and that James Dunsmuir had entered into an agreement with her in recognition and settlement of her claims upon the estate by which he undertakes to pay her annually the sum of twenty-five thousand ($25,000.00) dollars during the term of her natural life, beginning with the death of testator. This agreement I understand to be made in effectuation of the decedent's expressed wishes, as well as in composition of all claims which the widow might have made upon the estate of her deceased husband, whether by contesting the will, or by way of statutory claims for family allowance, homestead, etc.

It is now claimed on behalf of the brother, nominally the sole legatee under the will, that the provision thus made [45] for the widow should be regarded in the assessment of the collateral inheritance tax, and should be there treated in just the same manner as if it had been made by the testator himself, that is to say, the taxable value of the brother's interest in the estate is merely residuum left after deducting from the total distributive value of the estate the value of the widow's share, the latter being expressly exempted from taxation (Statutes 1899, *ubi supra*).

This contention has the support of authority.

Dos Passos, Inheritance Tax Law, secs. 43, 65, 24 Am. & Eng. Law.

Re Pepper's Estate, 159 Pa. St. 509.

Re Kerr's Estate, 159 Pa. St. 512.

Page vs. Rives, 1 Hughes, Fed. Cas. 10,666.

The principal involved in these matters that it is proper for the Court in fixing taxes imposed upon these transfers of property by will or by succession to make taxation conform to actual conditions or beneficial enjoyment and to relieve the nominal beneficiary from the burden of the tax when it is satisfactorily shown that the real beneficiary is a person exempted by law from such taxation.

In the present instance I have examined witnesses under oath and received documentary evidence, from all of which it is established beyond doubt that the decedent, Alexander Dunsmuir, left him surviving a widow, Josephine Dunsmuir; that James Dunsmuir, the sole legatee under the will was instructed by testator shortly before his death to provide for her out of the estate and that James Dunsmuir, the said legatee, has accordingly entered into a written contract with Josephine Dunsmuir, the widow, whereby he undertakes to pay her the sum of [46] $25,000.00 annually during the term of her natural life, in full satisfaction of all her claims in the premises and upon her husband's estate. Payments in full to date have been made regularly.

Under these circumstances I am compelled to report that for purposes of taxation, the otherwise taxable interest of James Dunsmuir in this estate is to be deemed subject to and burdened with an annuity in favour of testator's widow in the amount of $25,000.00.

6. VALUE OF THE PROVISION MADE FOR DECEDENT'S WIDOW.

The Statutes (Statutes 1895, Chap. XXVIII, p. 33, sec. 11) provides a method for determining present values of annuities, and pursuant thereto I obtained an order (exhibit D subjoined) directing the Insurance Commissioner of the State of California to make the necessary computation of the value of an annuity of $25,000.00 under the conditions as to age, etc., present in the case before us. The report of the Insurance Commissioner (exhibit E subjoined) shows the present cash value of the annuity in question to be $314,075.00.

7. NO TAXABLE RESIDUUM.

As the value of the entire estate, shown above, is only $200,000.00, it is at once seen that the burden placed upon the legatee's enjoyment of it by reason of the widow's claim is much in excess of its value, and that there consequently remains in the legatee no interest that is taxable.

8. RESIDENCE OF DECEDENT.

Mindful of the term of our statutes, and of various decisions, which uphold the taxation in the domicile of the decedent of personal property having actual *situs* outside of [47] this domicile, and being informed that Alexander Dunsmuir died possessed of personal property in British Columbia not included in the property here appraised, I conducted an enquiry into the facts affecting the question of his legal residence as a result of which I beg to report that Alexander Dunsmuir, deceased, was a British sub-

ject and a resident of British Columbia. No attempt is therefore made to apply the collateral inheritance tax to property left by him in foreign jurisdictions.

9. NO TAXATION OF PROFITS ACCRUING SINCE TESTATOR'S DEATH.

The final account shows the receipt by the executor of certain moneys received by him as the net profits of the property of the estate, accruing subsequently to the death of the testator. This increment is not subject to taxation.

Dos Passos, Inher. Tax. Law, pp. 418, 419; 24 Am. & Eng. Ency. Law, p. 469.

Re Vassar, 127 N. Y. 1.

I have therefore not further considered it in making this appraisement.

10. IN CONCLUSION.

I beg to state that the facts here reported by me on the basis of which the Court is respectfully advised that no collateral inheritance tax is impossible in the matter of this estate, were elicted by examination of witnesses under oath administered by me as Court Commissioner and under my order of appointment as appraiser, which order following the statute directs me to report to the Court all pertinent facts affecting the taxation or exemption for taxation of all interests in this estate (see copy of order Exhibit F, annexed). [48]

The fair equivalent of five days has been actually and necessarily employed by me in this matter.

Respectfully submitted,

FINLAY COOK,

Appraiser.

Dated June 1st, 1901.

In the Superior Court of the City and County of San Francisco, State of California.

DEPARTMENT NO. 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

No. 23,158. (Copy.)

OATH OF APPRAISER OF PROPERTY SUBJECT TO COLLATERAL INHERITANCE TAX.

State of California,
City and County of San Francisco,—ss.

Finlay Cook, being duly sworn, deposes and says: That he is the duly appointed appraiser of property and interest in the said estate subject to collateral inheritance tax, and that he will, as such appraiser, truly, honestly and impartially appraise all such property and interests therein to the best of his knowledge and ability.

[Seal] FINLAY COOK.

Subscribed and sworn to before me this 26th day of June, 1900.

N. E. W. SMITH,

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT A.

To the State Controller, Sacramento, Cal., the District Attorney, San Francisco, Cal.; the City and County Treasurer, San Francisco; and Messrs. Wilson & Wilson, Attorneys for James Dunsmuir, Executor of and Sole Legatee Under the Last Will and Testament of Alexander Dunsmuir, Deceased, Mills Building [49] San Francisco, Cal.

In the Superior Court of the City and County of San Francisco, State of California.

DEPARTMENT NO. 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

Notice is hereby given that the undersigned has been duly appointed by the above-named court to appraise all interests in the above-named estate that are subject to collateral inheritance tax, and that he will make such appraisement on Monday, the 3d day of July, 1900, at 2 P. M., at his office, room 16, seventh floor, Mills Building, San Francisco, Cal.

FINLAY COOK,
Appraiser. (Copy)

Dated June 25th, 1900.

EXHIBIT B.

I, Alexander Dunsmuir, of San Francisco, California, United States of America, hereby revoke all wills and testamentary dispositions by me heretofore made, and declare this to be my last will and testament.

I, give, devise and bequeath all my property, both real and personal wheresoever situate unto my brother James Dunsmuir of Victoria, Province of British Columbia absolutely and I appoint the said James Dunsmuir sole executor of this my will.

In testimony whereof I have hereunto set my hand this twenty-first day of December, one thousand eight hundred and ninety-nine.

ALEXANDER DUNSMUIR.

Witnessed by

J. A. S. LOWE, Sausalito, Cal.

JAMES P. TAYLOR, Oakland, Cal.

[50]

EXHIBIT C.

In the Superior Court of the City and County of San Francisco, State of California.

DEPARTMENT NO. 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

No. 23,158 (Copy).

APPLICATION TO INSURANCE COMMISSIONER TO DETERMINE VALUE OF CERTAIN INTERESTS SUBJECT TO COLLATERAL INHERITANCE TAX.

Finlay Cook, Appraiser of property of said estate subject to collateral inheritance tax, having reported to the Court that there is a certain annuity more particularly hereinafter described, the present value of which must be determin*ing* in fixing said tax:

Now, therefore, it is hereby ordered that the Insur-

ance Commissioner of the State of California be and he is hereby requested to determine the present value of an annuity of $25,000.00 payable in equal monthly instalments to a person aged 49 years and 1 month at the commencement of said payments.

Said value shall be determined by the rule, method, and standards of mortality and of value that are set forth in the actuaries combined experience tables of mortality for ascertaining the value of policies of life insurance and annuities and for the determination of the liabilities of life insurance companies save that the rate of interest to be assessed in computing the present value thereof shall be five per centum per annum.

And said Commissioner is hereby directed to make report and return in accordance herewith to said Finlay Cook, appraiser as aforesaid.

Dated May 29th, 1901.

JAS. M. TROUTT,
Judge of Superior Court. [51]

EXHIBIT D.

ANDREW J. CLUNIE, Commissioner. M. M. ROHRER, Deputy.

(Vignette) Office of Insurance Commissioner. (Copy)
501 Clunie Building,
San Francisco, May 29th, 1901.

Finlay Cook, Esq., San Francisco:

Dear Sir,—In accordance with the order of Judge Jas. M. Troutt in the matter of the estate of Alexander Dunsmuir, deceased, directing me to give the

present value of an annuity of twenty-five thousand dollars, the age of the annuitant being 49 years, I hereby state amount to be three hundred and fourteen thousand and seventy-five dollars ($314,075.00).

Yours respectfully,

[Seal of Ins. Com.] ANDREW J. CLUNIE,
Ins. Com.
By M. M. Rohrer,
Deputy.

EXHIBIT E.

In the Superior Court of the City and County of San Francisco, State of California.

DEPARTMENT NO. 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

No. 23,158. (Copy.)

ORDER APPOINTING APPRAISER OF PROPERTY SUBJECT TO COLLATERAL INHERITANCE TAX.

It appearing to the Court that the values of certain interests in the estate of said deceased subject to the payment of collateral inheritance tax, are uncertain:

It is hereby ordered that Finlay Cook, Esq., a Court Commissioner of the city and county of San Francisco, State of California, a competent person, be and he is hereby appointed appraiser to appraise all interests herein subject to collateral inheritance tax, and to make a report thereof [52] in writing to the Court, together with such other facts in relation thereto as said Court may by order require, and par-

ticularly any facts in relation to the said matter which may come to his knowledge and which may tend to assist the Court in determining what interests herein are subject to the said tax, and in assessing and fixing the market value of any interest in said estate subject to said tax, said report to be filed with the clerk of said Court.

And it is further ordered that the said appraiser be and he is hereby required to include in his said report a complete list of all interests in the said estate, showing in the case of each whether it is, in his opinion, subject to collateral inheritance tax, with the reasons for his said opinion, and the facts and authorities upon which he bases such opinion.

And it is further ordered that the said appraiser be and he is hereby directed to give notice by mail forthwith of the time and place at which he will appraise said property to all persons known to have or claim an interest in any of the property of the said estate, as the same may appear from the papers on file herein, or may otherwise be made known to him; and to the Controller of the State of California, the Treasurer of the City and County of San Francisco, and the District Attorney of the City and County of San Francisco; said notice to be mailed at least five days before said day of appraisement.

JAS. M. TROUTT,
Judge of the Superior Court.

Dated June 25th, 1900. [53]

EXHIBIT F.

BRITISH CONSULATE GENERAL.

(Seal) San Francisco,

TO ALL WHOM THESE PRESENTS SHALL COME:—

I, Wellesley Moore, Esquire, British Vice-Consul at San Francisco in the State of California, do hereby certify that Frank J. Murasky, whose signature is attached to the annexed certificate, is, and was at the date thereof, Presiding Judge of the Superior Court in and for the city and county of San Francisco in the State of California; and that Albert B. Mahony whose signature is attached to the annexed certificate is, and was at the date thereof county clerk of the city and county of San Francisco in the State of California and ex-officio clerk of the Superior Court thereof, and that the Seal attached thereto is the official seal of the said Superior Court and as such entitled to full credit.

In testimony whereof I have hereunto set my hand and seal of office in San Francisco the 11th day of August, 1903.

(Stamp) WELLESLY MOORE,
British Vice-Consul.

In the Superior Court in and for the City and County of San Francisco, State of California.

DEPARTMENT NO. 10—PROBATE.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

I, Albert B. Mahony, County Clerk of the City and

County of San Francisco and ex-officio clerk of the Superior Court of California, do hereby certify that I have compared the foregoing with the original thereof; and that I am the keeper of all said original, keeping same on file in my office as the legal custodian and keeper of the same under the laws of the [54] State of California, and I further certify that the foregoing copy attached thereto is a full, true and correct copy of the report and appraisement of collateral inheritance and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside but is still of full force and effect. All of which I have caused to be exemplified according to the Act of Congress.

In witness whereof I have hereunto set my hand and affixed the seal of the said Court this 10th day of August, A. D. 1903.

(Seal) ALBERT B. MAHONY,
County Clerk.

I, Frank J. Murasky, Presiding Judge of the Superior Court, city and county of San Francisco, State of California, do hereby certify that said Court is a Court of record, having a clerk and seal, that Albert B. Mahony who has signed the annexed attestation, is the duly elected and qualified County Clerk of the city and county of San Francisco, and was at the time of signing said attestation, ex-officio Clerk of said Court. That said signature is his genuine handwriting and that all his official acts as such clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 10th day of August, A. D. 1903.

FRANK J. MURASKY,

Presiding Judge of the Superior Court in and for the City and County of San Francisco, State of California.

State of California,

City and County of San Francisco,—ss. [55]

I, Albert B. Mahony, County Clerk of the City and County of San Francisco, and ex-officio clerk of the Superior Court of the city and county of San Francisco, State of California, do hereby certify that the Honourable Frank J. Murasky, whose name is subscribed to the preceding certificate is Presiding Judge of said Court, duly elected and qualified, and that the signature of said Judge to said certificate is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of the said Court this 10th day of August A. D. 1903.

ALBERT B. MAHONY,

County Clerk of the City and County of San Francisco, State of California and ex-officio Clerk of the Superior Court thereof."

Upon such offer the following proceedings took place, viz.:

Mr. THORNE.—I would like at this point to offer the Report and Appraisement of the Appraiser of Collateral Inheritance Taxes, in the Matter of the Estate of Alexander Dunsmuir, for the Superior

Court of the City and County of San Francisco, State of California; the Order Appointing the Appraiser, and the Report of the Appraiser.

Mr. PIER.—We object to the admission of this Appraisement upon the ground that it is immaterial, irrelevant and incompetent what the Inheritance Tax Appraiser in the State proceedings may think about this agreement made between James Dunsmuir and Josephine Dunsmuir.

The COURT.—Does he express his thoughts in there about that?

Mr. PIER.—Yes; he goes into it and gives quite an extended [56] review of legal authorities.

The COURT.—And what is the claim for this?

Mr. THORNE.—That this is a judgment *in rem,* the proceedings taken in the Superior Court in and for the City and County of San Francisco, that it binds all the world; that this Collector of Internal Revenue was appointed by law, one of the purposes of his appointment being for this particular tax.

The COURT.—Was he appointed to assess this same tax you are suing for the recovery of?

Mr. THORNE.—He was appointed by the Government of the United States for the purpose of collecting this tax.

The COURT.—Who was?

Mr. THORNE.—The defendant in this case.

The COURT.—I thought that you were speaking of this Report? I say, what do you claim for this Report?

Mr. THORNE.—I was going on with my reasons; that this defendant is bound by this judgment *in rem*

for these reasons. It is a judgment *in rem;* assuming jurisdiction and proper notice, it binds the world, all the world. Everybody who had any claim or any interest in the property distributed is presumed to be before the Court. If he had any claim it was his duty to appear there. The Collector of Internal Revenue had the right to appear before Judge Troutt on the distribution proceedings and say that my tax depends upon whether or not Alexander Dunsmuir was domiciled in California; it depends also upon whether or not there is personal [57] property or real property, and how much real property. It also depends upon the amount of administration expenses—

The COURT.—I don't know anything about that. What has this report got to do with it? This was a report upon which the State Court acted?

Mr. THORNE.—Yes, sir.

The COURT.—You have put in the judgment of the Court?

Mr. THORNE.—This is one of the orders. It is a report by an officer of the Court—it is an administration; it is a judgment *in rem,* the same as a decree of distribution.

The COURT.—You mean this report is?

Mr. THORNE.—This report, as far as it goes, as regards the inheritance tax of the State.

The COURT.—No; that can in no way bind the Government in this proceeding to collect its independent tax.

Mr. THORNE.—It is evidence of these facts that are recited.

(Testimony of Peter W. Bellingall.)

The COURT.—The objection is sustained.

Mr. THORNE.—We note an exception.

Exception No. 1.

[Testimony of Peter W. Bellingall, for Plaintiff.]

PETER W. BELLINGALL, called as a witness for plaintiff, after being duly sworn, testified as follows:

I am a custom-house broker in San Francisco and have been such for thirty-seven years. I knew Alexander Dunsmuir in his lifetime and I knew him from the first time he came to San Francisco. The first time he came here on a visit. When he came down on business he came to supersede Mr. Berryman who had been the agent for the Wellington coal. Alexander Dunsmuir told me that he was a subject of British Columbia.

Mr. THORNE (Counsel for Plaintiff):

Q. Do you know anything about where Alexander Dunsmuir resided? [58]

A. Well, I know from my business in the custom-house that I frequently had to get someone to sign as sureties on bonds and he could not do it on account of his being a foreign citizen.

Q. Do you know of what country he was a subject?

A. I know that he told me he was a subject of British Columbia.

Q. Do you know of your own knowledge as to where he regarded his residence—what places he regarded as his residence?

A. I know from what he told me, and particularly in one case where he wanted to buy an American

(Testimony of Peter W. Bellingall.)

vessel and I told him at the time that on account of his own statement he was not eligible to own a vessel in America; that he might hold a mortgage on a vessel but not the ownership of one. At that time he wanted to buy the "Richard The Third," a sailing vessel, or rather, a half interest in her for Captain McIntyre. The money was turned over to McIntyre. He bought the vessel, that is, the half of it, and my office drew up a mortgage for the half from McIntyre to Dunsmuir. That is as near as my knowledge goes of his residence being in Victoria.

Q. Did the mortgage state that he was a resident of Victoria? A. How is that?

Q. How did that show that he was a resident of Victoria?

A. He stated it to me when he first talked about it. I asked him if he made his residence in San Francisco and he said no, his residence was with his father at that time. His father was alive at that time, according to my recollection.

Q. When was that?

A. I could not say except I went to the records of the custom-house and found out.

Q. Well, about when?

A. Well, I should say it was upwards of 20 years ago. [59]

On cross-examination the witness testified as follows:

I knew Alexander Dunsmuir for more than ten years. I knew him when he came down with his father as a boy. When Dunsmuir came down to

(Testimony of Peter W. Bellingall.)

supersede Berryman, he did not open up offices. The office went right along. It was not considered at that time to be the Dunsmuir Company. It was Berryman & Doyle, Berryman & Doyle being the agents for the Dunsmuirs. Doyle died, Berryman dropped out of the business entirely and the firm became Dunsmuir, Diggle & Co. Diggle was a partner in the firm and a lieutenant in the British Navy. In San Francisco Alexander Dunsmuir generally lived in hotels. It is my recollection that he was in the Occidental and I think he was in the Palace Hotel at one time. I do not consider that he lived in San Leandro. He had what we call a country place and which he bought for his wife. I do not think he stayed there much. I lived in Oakland and I think I met him on the boat only three or four times. I do not know that his wife lived at San Leandro. I did not go to the house. I knew where the place was. I was not familiar with the house.

Mr. PIER.—Q. The only time you ever had any occasion to consider the question of what country he was a subject, was at the time of buying this particular vessel?

A. No, I had frequently.

Q. (Intg.) That was on account of the bonds?

A. Yes, sir.

Q. But that was because he was a citizen of British Columbia?

A. They would not allow anybody to sign as sureties on the bond—I had to go and get Adolph Spreckels to sign bonds, and [60] I wanted him

(Testimony of Peter W. Bellingall.)

to return the compliment, and he said that he was not a resident and could not sign.

Q. That was because he was a citizen of British Columbia?

A. They would not take him because he was a British subject.

Q. And also at the time of buying the vessel, it was because he was a British subject that he could not buy the vessel? A. That was the reason.

Mr. THORNE.—I understood you also to say it was because he was not a resident of San Francisco?

A. That is the way I learned it from himself in talking about these matters.

The COURT.—The fact that a man is not a resident of San Francisco would be no objection to his buying a vessel of American bottom, but it is objectionable if he is a foreigner.

Mr. THORNE.—Did you visit Alexander Dunsmuir when he lived in the city, at his place of abode?

A. No, sir, I never did.

Counsel for plaintiff here offered in evidence agreement between James Dunsmuir and Josephine Dunsmuir, dated December 1st, 1900, which was admitted in evidence and marked Plaintiff's Exhibit No. 4. Said document reads as follows:

[Plaintiff's Exhibit No. 4—Agreement Dated December 1, 1900, James Dunsmuir and Josephine Dunsmuir.]

"THIS AGREEMENT, made and entered into this first day of December, A. D. 1900, by and between James Dunsmuir, of Victoria, B. C., brother

of Alexander Dunsmuir, deceased, the party of the first part, and Josephine Dunsmuir, of San Leandro, Alameda County, California, widow of the said Alexander Dunsmuir, deceased, the party of the second part.

WITNESSETH:

WHEREAS, said Alexander Dunsmuir departed this life in the city of New York, State of New York, on the 31st day [61] of January, 1900, leaving surviving him a widow, the said Josephine Dunsmuir, party of the second part hereto, but no children; and

WHEREAS, said Alexander Dunsmuir left a last will and testament dated December 21st, 1899, by which he devised and bequeathed all of his property both real and personal and wheresoever situate to his brother the said James Dunsmuir in form absolute, but in fact according to the previous understanding and agreement between the said James Dunsmuir and said Alexander Dunsmuir in his lifetime, partly in trust for the benefit of said Josephine Dunsmuir, widow, as aforesaid, and

WHEREAS, said Alexander Dunsmuir left property, both real and personal, situate both in the Province of British Columbia and in the State of California; and

WHEREAS, said last will and testament was admitted to probate in the Supreme Court of British Columbia on the 26th day of February, 1900, and all of the estate of the said deceased, both real and personal situated in British Columbia, was thereafter by decree of the said Court distributed to said James

Dunsmuir, pursuant to the terms of said last will and testament; and

WHEREAS, an authenticated copy of said last will and testament was thereafter, to wit, on the 9th day of May, 1900, admitted to probate in the Superior Court of the State of California, in and for the city and county of San Francisco in which jurisdiction a portion of the property belonging to said decedent is situate, which ancillary administration is still pending in said last named Court; and

WHEREAS, since the death of said Alexander Dunsmuir the [62] said James Dunsmuir, in accordance with said previous understanding and agreement between said James Dunsmuir and said Alexander Dunsmuir in his lifetime, has from time to time made suitable provisions for said Josephine Dunsmuir, widow of the said brother as aforesaid; and

WHEREAS, in consideration of the premises, the parties hereto are mutually desirous of coming to an understanding and agreement concerning said trust hereinabove referred to;

NOW, THEREFORE, this agreement witnesseth, that said James Dunsmuir, in consideration of the premises, does hereby covenant, promise and agree to and with the said Josephine Dunsmuir to pay her, for and during the term of her natural life, the sum of Twenty-five thousand (25,000) Dollars per annum, in gold coin of the United States of America, payable in equal monthly installments, in the said city and county of San Francisco, commencing from the date of the death of said Alexander Dunsmuir; and

also and in addition thereto the full one-half of the net income arising from any and all property both real and personal, left by said Alexander Dunsmuir in the State of California which said James Dunsmuir shall or has received from the estate of said Alexander Dunsmuir, deceased, but only after the R. Dunsmuir's Sons Company, a corporation, shall have paid to R. Dunsmuir Company, a corporation under the laws of British Columbia the present existing indebtedness due from it to the latter corporation, all payments on account of such income to be made monthly; it being understood and agreed that the said annual payments of twenty-five thousand (25,000) dollars, and all payments on account of such income shall cease and determine upon the death of the said Josephine [63] Dunsmuir, widow, as aforesaid:

And in consideration of the said payments already made and to be made as hereinabove set forth, the said Josephine Dunsmuir, widow as aforesaid, does hereby expressly waive, relinquish and renounce, as heir at law and widow of Alexander Dunsmuir, deceased, for herself, her heirs, administrators and assigns, all right, claim and interest in and to any and all of the property left by the said Alexander Dunsmuir both real and personal and wheresoever situate, and in and to all family allowance arising either under the laws of the Province of British Columbia or under the laws of the State of California:

This agreement shall and is hereby declared to be binding and obligatory on the heirs, executors, ad-

(Testimony of William Greer Harrison.)

ministrators and assigns of both parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first herein above written.

In duplicate.

(Signed) JAMES DUNSMUIR. (Seal)

(Signed) JOSEPHINE DUNSMUIR. (Seal)

Witness:

RUSSELL J. WILSON.

M. S. WILSON.

Duly acknowledged before James Mason, Notary Public in and for the City and County of San Francisco, State of California, as to the signatures of both James Dunsmuir and Josephine Dunsmuir."

[Testimony of William Greer Harrison, for Plaintiff.]

WILLIAM GREER HARRISON, called as a witness for plaintiff, after being duly sworn, testified as follows:

I reside in San Francisco and have resided there [64] about thirty-nine years. I knew Alexander Dunsmuir in his lifetime and I knew him for about twenty years. I became acquainted with him when he first came to San Francisco. He was representing here in San Francisco a coal firm, his people's firm. He was attending to the sales of coal here in San Francisco.

Mr. THORNE.—Did you ever have any conversation with Alexander Dunsmuir in reference to his residence?

A. Oh, yes, we frequently discussed that question.

(Testimony of William Greer Harrison.)

In conversation he always referred to British Columbia as his home.

Q. Had you any conversations in regard to that subject?

A. Quite frequently, because he was very fond of collecting stamps, and in a sort of semi-jocular way when he met me he would ask for stamps and that would lead to a discussion of Canadian vs. American method of Government, and so on. He rather seemed to take pleasure in insisting that his home was British Columbia.

Q. Did he ever state to you anything in regard to his being a British subject? A. Oh, yes.

Q. What did he say in regard to that?

A. He was always a British subject, always as long as I knew him.

Q. What did he say in regard to that?

A. He considered that to be a British subject was something not to be lightly disposed of.

Q. Just state what he said in regard to that, as near as you can.

A. His expressions were general and sometimes specific. He would get into an argument with me as to the extreme value of British citizenship. I would take the American view and he would take the Canadian view. He was very enthusiastic [65] about Canada and about the methods of the government. I was equally enthusiastic—although then a British citizen myself—my views differed from his materially. He always wound up by saying he would not give up his citizenship, that he was a

(Testimony of William Greer Harrison.)

Canadian and would remain a Canadian; he was a British subject and would always remain a British subject.

Q. Can you tell when the last conversation with him was, when the subject of his home in British Columbia was discussed?

A. No, I could not fix that date; in fact, we had so many conversations on the subject that it would be rather confusing. But say a couple of years before he died he asked me to secure for him a package of English Revenue stamps. That led to a renewal of the conversation. That is as near as I can fix it.

Q. What did he say?

A. He said he was very anxious to have those stamps, that he could not get them here. And at that time I wrote to my head office—at that time I represented a large British corporation—and got the stamps for him. He expressed great pleasure in receiving them and congratulated himself on being a British subject.

Q. Did you ever visit him at the places where he dwelled in San Francisco, here?

A. No. My association with Dunsmuir was business and social. We belonged to several clubs and met in clubs.

Q. What clubs were they? Were they British clubs?

A. No, he belonged to the Pacific-Union Club, as I did; and he also belonged to the Olympic Club, as I did. I met him practically every day on

(Testimony of William Greer Harrison.)

"Change"; many of our discussions were at the Merchants' Exchange.

Q. Did he belong to the British Benevolent Society? A. Yes. **[66]**

Q. Are you a member of that organization?

A. Yes, I am a life member.

On cross-examination the witness testified as follows:

I met Alexander Dunsmuir frequently at the Clubs and I came in contact with him at the Merchants' Exchange on business matters.

Mr. PIER (Counsel for Defendant):

Q. These conversations you talked about were directed primarily at citizenship, were they not, the difference between British citizenship as compared with American citizenship? A. Yes.

Q. Did he ever talk about California as a home?

A. Oh, he was very fond of California.

Q. He liked to live here, did he not?

A. Oh, no; he always insisted that he was here because he had to be here to represent his firm in British Columbia.

[Testimony of J. E. Freeman, for Plaintiff.]

J. E. FREEMAN, called as a witness for plaintiff, after being duly sworn, testified as follows:

I am an architect and have resided in San Francisco since 1887. I knew Alexander Dunsmuir in his lifetime. I had business relations with him. I was an architect at that time. I was employed by Mr. Dunsmuir to build a residence for Mrs. Wallace

(Testimony of J. E. Freeman.)

at San Leandro. That was in 1899, in which year the residence was built. In the course of my relations with Alexander Dunsmuir I had a conversation with him relative to his residence. The conversation was brought up in this manner; speaking about the different nationalities becoming American citizens, I stated the conclusion that among my business acquaintance, a great many of them Englishmen, whilst they had business dealings in San Francisco and resided here they never became American citizens. That was about the conversation. During the course of that conversation **[67]** he stated that he was an Englishman and his residence was in Victoria. That conversation took place between the months of May and December, 1899, in the old house at San Leandro. The new house was built for Mrs. Wallace. All the contracts for that house were made in the name of Mrs. Wallace.

On cross-examination the witness testified as follows:

Mr. PIER (Counsel for Defendant):

Q. Did he speak about his residence being in Victoria or his citizenship being in Victoria?

A. His residence.

Q. Did he talk about his home?

A. His home was Victoria.

Q. What kind of a home did he have up there—did he say?

A. He spoke of his home in this manner: regarding the superintendence of the residence his father

(Testimony of J. E. Freeman.)

built some years previous to that, that he had complete charge of it.

A. That is where his father lived at that time?

A. Mother and father.

Q. Did you know where he lived in San Francisco?

A. Yes; I called on him when he was living at the Grand Hotel.

Q. Did you notice he was fixed up at the Grand Hotel, did he have more than one room there?

A. Yes.

Q. Several rooms? A. Several.

Q. About how much time each year was he in San Francisco?

A. That I do not know. I can only speak of the time that I had business relations with him in the building of the house. He was living then in San Leandro, in the old house.

Q. Did he then say anything about liking San Leandro as a residence? A. Not particularly; no.

The COURT.—Q. Mr. Freeman, who paid for the building of the house?

A. That was a point that was brought up, and I **[68]** asked him how I should make the certificates out and who would pay the bills. He said, "Make the certificates out in the name of Josephine Wallace," and that Dunsmuir & Sons, acting as her agents, would pay the bills.

Q. And they did? A. And they did.

[Testimony of J. Homer Fritch, for Plaintiff.]

J. HOMER FRITCH, called as witness for plaintiff, after being duly sworn, testified as follows:

I reside in San Francisco and have resided here fifty-seven years. I knew Alexander Dunsmuir for about thirty years. I had a great many dealings with him.

Mr. THORNE (Counsel for Plaintiff):

Q. Did you ever have any conversation with Alexander Dunsmuir relative to his residence, his place of business? A. Yes, sir.

Q. Just state what the conversation was.

A. Well, it extended over such a period of time; for instance, when we first came in contact with Mr. Alex. Dunsmuir—

Q. (Intg.) Who do you refer to?

A. My father and I. They used to visit our house a great deal.

Q. Who did?

A. The old gentleman—his father and mother. Alex. and sisters; in fact, one of the sisters, when she was sent here, my sister took her over and introduced her at Mills Seminary, where she went to school. I know the girls particularly. And there used to be a regular scrap about an American and an Englishman; an American could not compare to an Englishman, according to their ideas.

The COURT.—He is talking about Mr. Alex. Dunsmuir, not the family.

A. Mr. Alex. Dunsmuir, to a certain extent shared that feeling; he was British right to the word "go."

(Testimony of J. Homer Fritch.)

He would frequently find fault about our American people, and everything of that kind. There is one instance I particularly [69] remember about his speaking of home; I think I gave that testimony once before. That was along about 1895 or 1896. I had been up to Victoria on a hunting trip with John Talbot. The following year Alex. Dunsmuir wanted me to join a party and go with him. When he came to me—I used to see him about every day when he was at the office. He says, "I am going up home on a hunting and fishing trip, I want you to go, you and Talbot; I said, "No; we was too well treated the last time we went up." Always in conversation, in speaking of Victoria, he always called it his home. His home he claimed to be with his mother in what was known as the Dunsmuir Castle in Victoria. I met him also in Victoria on my way down from a hunting trip, and he says, "I want you to go out home and see mother and the family." I said, "Mr. Dunsmuir, I cannot do it; father has telegraphed me and I have to go to-night." Then I said, "Will you come down town with me to dinner?" and he said, "No, we will go to the club a little while and then I will let you go."

Q. When was the last conversation you had with Alex. Dunsmuir in which he referred to Victoria as his home?

A. I think that was the last time, that I referred to. It was either 1895 or 1896.

Q. And he said that he was going up home?

A. Going home.

(Testimony of J. Homer Fritch.)

Q. To Victoria? A. Yes.

On cross-examination the witness testified as follows:

I visited him at the Grand Hotel. I never visited him in San Leandro and I never went to his rooms except when it was a matter of business. He never referred to San [70] Leandro as his home or to his rooms as his home. It is pretty hard to say how much time he spent each year in San Francisco. His main business was in Victoria. He was interested with his brother there. Was an official in a number of companies there. His active interest was not here in San Francisco. San Francisco was an agency. One of the Robert Dunsmuir's Sons' Company had an office here. Part of his business was to look after the San Francisco agency. In the first place, Mr. Berryman had the agency for the Dunsmuir coal. That was along 1875 or 1876. Mr. Berryman got to speculating pretty heavily and got behind in his accounts. Alexander Dunsmuir was sent down here to investigate those accounts. In the course of about a year or so Berryman had to turn over the San Francisco business to the Dunsmuirs. Alex. came down and took charge of that. He put a Mr. Jewett, who was a nephew of Berryman's in charge of the business here. When Jewett died Mr. Lowe, who was a bookkeeper, was put in charge. So that Alexander Dunsmuir was never what you would call an active member of the business here. He was a kind of overseer. He kept

(Testimony of J. Homer Fritch.)

largely between the two points. He stayed here a great deal of the time.

On redirect examination the witness testified as follows:

I believe Alexander Dunsmuir was either president or vice-president of the Esquimalt Railway in Victoria. I would not be sure which. I think he was president. The main business was conducted at Victoria under the name of R. Dunsmuir's Sons. The agency was conducted under the name of R. Dunsmuir's Sons' Company, a California corporation. I visited Mr. Dunsmuir at his rooms here in San Francisco [71] occasionally. I should not consider that he had a home here in San Francisco, in the sense that he owned a home. When I visited him he was living at the Grand Hotel part of the time. Also I think he was rooming at the Occidental Hotel part of the time. I think it was about the year 1899 when he was married.

Mr. THORNE.—Q. Do you know whether he was in the habit of taking Mrs. Dunsmuir with him to British Columbia?

A. No, I never knew of him taking her up there.

Q. She lived over at Pleasanton?

A. San Leandro. They were living together for a matter of 20 years, I guess.

Q. Before they were married? A. Yes.

Q. She always lived down here?

A. Yes. He lived here—

Q. I say she always lived down there? A. Yes.

(Testimony of J. Homer Fritch.)

Q. You never knew of him taking her up there to British Columbia?

A. No, he never did. He always used to keep that fact in his pocket.

Q. He married her shortly before his death, did he not?

A. Yes, I think about two or three months. I think he married her more to satisfy his brother. His brother would not call on him or would not recognize her in any way and I think that is what brought about the wedding.

The COURT.—Q. And perhaps on her account as well?

A. Yes, I think possibly there was something in that, but I think it was James who was instrumental in bringing it about.

[Testimony of Walter S. Thorne, for Plaintiff.]

WALTER S. THORNE, called as a witness for plaintiff, after being duly sworn, testified as follows: Mr. THORNE (Counsel for Plaintiff):

Q. Dr. Thorne, what is your business?

A. Well, my name ought to indicate my business. I am a medical man. **[72]**

Q. The "doctor" is not a part of the name?

The COURT.—We know you in this community, Doctor, but it would not show on the record unless you stated it.

A. Oh, very well. I knew Alexander Dunsmuir in his lifetime. I knew him slightly for three or four years and intimately for two years just prior to his death. I have had conversations with Alexander

(Testimony of Walter S. Thorne.)

Dunsmuir respecting his residence in Victoria. The last incident of that sort that I recall was just prior to their removal to San Leandro, about a month prior to the completion of the house which was, I think, completed in December, 1899. I said, "Now, you are going to have a nice home over there; why don't you become an American citizen, behave yourself like an American, you are going to live here." He said, "You are quite mistaken; I am not going to live here, this is not my home, and this house is not intended to be my home. I am building this for Mrs. Wallace"—whom he had not married at that time. He said, "Under no consideration would I become an American citizen." Upon further investigation on questioning him I learned that he really had—well, you may call it a provincial or national prejudice against American citizenship. We talked along those lines. He was very positive about it. He said, "My home and my people and my interests are in Victoria, and I don't propose to live here or to become a citizen." I do not remember how many conversations I had with him respecting this subject. I remember this conversation because it was just before he moved over there. That conversation is very distinctly impressed upon my mind because of the coincident relation of that house building and my saying to him, "Well, now, you are going to live here; why don't you become an American [73] citizen," and his strenuous and positive denial of any such intention. I visited him a number of times in San Leandro and do not recall any conversation re-

(Testimony of Walter S. Thorne.)

specting this subject of residence when I visited him there. He lived in that new house that was built at San Leandro for a short time. He died, I think, at one of the Broadway Hotels in New York City, in January, 1900. I visited Alexander Dunsmuir in the city and county of San Francisco. He lived at the Grand Hotel. When I visited Mr. Dunsmuir at the Grand Hotel, Mrs. Wallace was always present.

[Testimony of Thomas P. H. Whitelaw, for Plaintiff.]

THOMAS P. H. WHITELAW, called as a witness for plaintiff, after being duly sworn, testified as follows:

I reside at present in Piedmont. I previously resided in San Francisco for about forty-six years. I knew Alexander Dunsmuir in his lifetime. I have had business dealings with him. He was a citizen of British Columbia. He told me so. I have often been with him in Victoria, stopped with him at the Driard House in Victoria. He always kept his rooms there when he was in San Francisco. I have seen him a great many times in Victoria. The last time I saw him in Victoria was in 1887 or 1888. And I have visited him here at the Occidental Hotel. I have visited his mother's house up in Victoria. I have been to the Driard many times and had dinner with him. I visited him here at the Occidental Hotel. I never visited him at the Grand Hotel. We have had dinner at the Occidental Hotel. He had his rooms there when in San Francisco.

(Here it was admitted by counsel for defendant

(Testimony of Thomas P. H. Whitelaw.)
that Alexander Dunsmuir was at all times a British subject.)

On cross-examination the witness testified as follows: **[74]**

The Driard is a hotel in Victoria. Four times I went with Mr. Dunsmuir to what they call the Dunsmuir Castle, where his mother lived. He had rooms at the Driard House in Victoria, and also at his mother's house, upstairs in the upper part of the building. He had two rooms at the Driard House. He had two rooms at the Occidental Hotel. I don't think he kept the rooms here in San Francisco when he went to Victoria, but he always kept the rooms at the Driard. He told me that himself. That was in 1887. I was in Victoria working on some wrecks, and I used to see him very often. I was up there sometimes for three or four months. He spent more than three or four months of the year up in Victoria. He did not spend the greater part of each year in San Francisco. The greater part of his time was spent in British Columbia. I do not think he went hunting much; once in a while, possible.

[Testimony of W. E. Mighell, for Plaintiff.]

W. E. MIGHELL, called as a witness for plaintiff, after being duly sworn, testified as follows:

I knew Alexander Dunsmuir intimately in his lifetime. I was partner with him in ships. I have had business relations with him. I had a conversation with him in regard to where his residence or home was. The conversation opened about his buy-

(Testimony of W. E. Mighell.)

ing some stock in the California Shipping which I started and it drifted on to his residence, and I asked him why he had not become naturalized. He said that there was nothing in it, that his residence was in British Columbia, all his interests were there, that he owned an interest in the Wellington Collieries, the Esquimalt Railway, and was interested in Victoria and on the Island of Vancouver. He said he represented the firm of R. Dunsmuir & Sons here in San Francisco. The last conversation I had with him in relation to his residence was the afternoon before he was [75] married. We were on the Oakland Ferry, going from San Francisco to Oakland, and, if I remember right, there was an American ship flying an American ensign that we passed as we went over. I said, "Alex., that is the flag you ought to live under," and he said, "Oh, no; the flag I am under suits me, the English flag." "Well," I said, "Why don't you become naturalized, become an American? Your business is here." "Well," he says, "Bill, there is nothing to it; I would prefer to remain under the English flag, where all my interests are." At that time, he also mentioned that his residence was Victoria, British Columbia. I knew he lived there. I have visited him at his office there and have seen his brother there and his family.

On cross-examination the witness testified as follows:

Mr. Dunsmuir did not take stock in this California Shipping Company. He gave me as a reason for not doing so that he did not care to have anything that

(Testimony of W. E. Mighell.)

was under the American flag.

Mr. PIER (Counsel for Defendant):

Q. What was his idea on that?

A. Well, that he wanted to remain English, I suppose.

The COURT.—Q. Were you aware that he subsequently did see fit to incorporate his company under the American law?

A. That I know nothing about at all. I knew his father when he lived here.

(Witness continuing:) The conversation in regard to his buying stock in the California Shipping Company, which I have already mentioned, took place about November, 1899.

The COURT.—Q. At that time he told you he did not want anything under the laws of the United States? [76]

A. He claimed he wanted to be English.

The COURT.—Q. Did he own any stock in the R. Dunsmuir & Company? A. That I don't know.

The COURT.—I am asking counsel that.

Mr. THORNE.—Yes, he owned after that.

The COURT.—Q. How did you understand him to state to you that he did not want anything under the laws of the United States?

A. I did not think at all about it; I never asked him.

Q. I am asking you what would you say now as to such a statement to you in view of the fact that he was then half owner in a very large corporation?

A. What would I think about it?

(Testimony of W. E. Mighell.)

Q. Yes. A. I think it would not agree.

Q. Does it at all shake your recollection as to what he actually said to you? A. No.

[Testimony of William E. Mitchell, for Plaintiff.]

WILLIAM E. MITCHELL, called as a witness for plaintiff, after being duly sworn, testified as follows:

I was employed as a clerk in the Bank of British Columbia during the years 1883 to 1900, inclusive. I had occasion to come across the signature of Alexander Dunsmuir in the course of my employment. I am familiar with his signature. During the years 1894 to 1900, inclusive, I was a ledger-keeper in the bank, and in that capacity I would come across the signature of Alexander Dunsmuir. I can't say I ever saw him write his signature. I know those were his signatures, because in the course of business, we see signatures and recognize them as being the signatures of the parties to whom they are credited. We also had specimen signatures which we went by, facsimilies. I saw in the ordinary course [77] of business what would purport to be the genuine signature of Alexander Dunsmuir. I may have paid out money on his signature. I don't remember whether or not I did. During the years I have been in the bank I have been in different positions. (Witness being shown Plaintiff's Exhibit No. 5, which is a page from the register of the Hotel Imperial, continued:) I see the signature of Alexander Dunsmuir on that paper. I mean not merely that I see the name "Alexander Dunsmuir," but I see what, in my judgment, is his genuine signature. The following

(Testimony of William E. Mitchell.)

entry on that paper is in the handwriting of Alexander Dunsmuir, viz.: "Alex. Dunsmuir, wife & maid, Victoria, B. C."

On cross-examination, the witness testified as follows:

I have met Alexander Dunsmuir, casually. I might have talked to him, but I don't remember of having done so. All I can say about this signature is that it is the signature upon which I acted in the regular course of business in entering up checks in the ledger.

[Testimony of George Russell Reed, for Plaintiff.]

GEORGE RUSSELL REED, called as a witness for plaintiff, after being duly sworn, testified as follows:

I reside in Berkeley and am engaged in business in San Francisco. I have been engaged in business in San Francisco for about twenty-five years. I take periodical trips to New York. I was in the city of New York on December 26th, 1899. I stayed at the Hotel Imperial and I registered at that hotel on that day. (Witness being handed Plaintiff's Exhibit No. 5, which is a page from the register of the Hotel Imperial, continued as follows:) I find my signature on that paper. That paper contains the following entry: "Geo. R. [78] Reed, S. F." "Geo. R. Reed" is under the column headed "name" and under the column headed residence, is "S. F." in my handwriting. This paper (referring to Plaintiff's Exhibit No. 5) is all to appearances and to my best belief the page from the register of the Hotel Imperial that I

(Testimony of George Russell Reed.)

signed on that day, but I cannot, under the circumstances, positively swear that I know it is. I have no doubt whatever that it is so.

Counsel for plaintiff offered in evidence page from the register of the Hotel Imperial, which was admitted in evidence and marked Plaintiff's Exhibit No. 5. Said paper reads as follows:

[Plaintiff's Exhibit No. 5—Register Entries of Hotel Imperial December 25, 1899, etc.]

"HOTEL IMPERIAL.

Robert Stafford.

Monday. New York, Dec. 25, 1899.

Money, Jewels, and other valuable Packages must be placed in the Safe in the Office, otherwise the Proprietors will not be responsible for any loss.

Name.	Residence.	Room.
Continued.		
Mrs. Laura Barker	City	169
Miss McDonald	"	169
John D. Shibe	Phila	234
Tuesday, Dec. 26th, 1899.		
W. R. Bowman & wife	Phila., Pa.	190
Geo. R. Reed	S. F.	234
Wm. Chaflin	St. Catherine, Ont.	354
Jno. W. Parker	Havana, Cuba	170
J. A. Northrop	Johnstown, N. Y.	254
Scott H. Hayes	Cleveland, O.	91
Randolph Tobias	Charleston, SC	124
Harry Nonnent	Wash D. CC	234
Francis J. Washington	Balto. Md.	104

Wm. J. Crawford, Jr.	Philada	78
J. I. Sweet	Jewett City Ct	286
Miss Stoddard	Phila	434
G. W. Stalker	Chicago	295

[79]

HOTEL IMPERIAL.

Robert Stafford.

Continued: New York, 12/26, 1899.

Money, Jewels, and other valuable Packages must be placed in the Safe in the Office otherwise the Proprietors will not be responsible for any loss.

Name.	Residence.	Room.
E. P. Bennett and wife	New Haven Ct	141
F. E. Ables	Milwaukee	133
Hansen Smith	Duluth	338
F. W. Kavanaugh	Waterford, N. Y.	412
Mrs. H. S. Platt, Jr.	St. Louis, Mo.	340
Miss Annie Johnson	St. Louis, Mo.	340
W. P. Armitage	Troy N. Y.	304
Thomas Gresham	Chester S. C.	393
J. M. Jamison	Hamlet, N. C.	393
W. E. Seabrook	" "	393
Alex. Dunsmuir, wife &		490
maid		491
Victoria, B. C.		492
		493
C. S. Middleton & wife	San Francisco	187
J. H. Zerbez & wife	Pottsville, Pa.	389
Wm. Bailey	Williamsport, Pa	82
Richard Bartholdt	St. Louis Mo.	431
John Philip Sousa, Jr.	N. Y.	404

(Testimony of George Russell Reed.)

W. H. Stratton	Conn	86
W. F. Finlayson	Boston	65
Jas. Bell	"	67
F. J. Graham	"	69

On cross-examination the witness testified as follows:

I know in this way that I actually wrote my name on the register of the Hotel Imperial on the 26th day of December, 1899. I know I went to New York, was in New York at that time, registered at no other hotel and would swear that that is my signature. Independently of this paper (referring to Plaintiff's Exhibit No. 5), I would be able to state that I had registered at that hotel on December 26th, 1899, after taking the time to look up my business records in New York at that time, of which there are business entries [80] connected with the house with *him* I was doing business. I have not looked up those business records as it would take some time to do so as it has been twelve years. I have an independent recollection at this time of the circumstances concerning the signing of my name to this paper, in this respect, that as I remember it Mr. Bate, the Secretary of the Edward H. Levy Company of New York, was to meet me to go to the club on that day, and I could not have met him and gone on that day had I not registered at the Hotel Imperial on that day, because he was to meet me at the Hotel Imperial. That was the day I arrived in New York, and I had my engagement with Mr. Bate on that day.

Defendant's Case.

Mr. PIER.—I want at this time to introduce in evidence a certified copy, certified by the Secretary of State, of the Articles of Incorporation of the R. Dunsmuir's Sons & Company, which gives the residence of Alexander Dunsmuir, at San Francisco, California. The Code specifically provides that each of the incorporators shall give his name and residence. This was done in the regular course of business.

The COURT.—Is it sworn to?

Mr. PIER.—The Articles of Incorporation were acknowledged before James Mason.

Mr. THORNE.—We object to the introduction of this document in evidence upon the ground that it is immaterial, irrelevant and incompetent, and further that it is an attempt to impeach the judgment of a court of competent jurisdiction, namely, the Superior Court of the State of California, in and for the City and County of San Francisco, adjudged that Alexander Dunsmuir was a resident domiciled in Victoria at the time of his death, and that being a judgment *in rem* this amounts to a collateral attack upon that judgment. [81]

The COURT.—The objection is overruled.

Mr. THORNE.—We take an exception.

Exception No. 2.

The document was admitted in evidence, marked Defendant's Exhibit "A," and reads as follows:

Defendant's Exhibit "A"—Articles of Incorporation of R. Dunsmuir's Sons Co.]

"ARTICLES OF INCORPORATION

of the

R. Dunsmuir's Sons' Company.

Know all men by these Presents, that we, whose names are hereunto subscribed, have this day voluntarily associated ourselves for the purpose of forming, and do together form a corporation, under the laws of the State of California.

And we hereby certify,

FIRST: The name of the incorporation is

R. DUNSMUIR'S SONS COMPANY.

SECOND: The purposes for which it is formed are, to acquire, own, hold, improve, lease and dispose of lands, and interests in lands; to acquire, build, construct, own, hold, manage and use wharves, docks, basins, drydocks, piers and warehouses, or any interest in the same; to borrow and loan money; to engage in, and carry on the business of commerce, foreign and domestic; to build, equip, furnish, or buy and sell, or charter ships and vessels, and navigate the same; to purchase, take hold, and use shares of the capital stock of other corporations, or membership therein; to purchase, acquire and use personal property of every name and description; to act as

agents for other persons or corporations in the transaction of business; to locate, acquire, hold, develop and operate mines of precious or valuable ores, metals, and other substances, and deal in and with the products of mines of every kind or nature; [82] to sell, convey, grant, mortgage, hypothecate or otherwise dispose of property, real or personal, and generally, to do and transact any business for which individuals may lawfully associate themselves, and which are not prohibited by the laws of the State of California.

THIRD: The place where its principal business is to be transacted is the City and County of San Francisco in the State of California.

FOURTH: The terms for which it is to exist is fifty years.

FIFTH: The number of its Directors is five, and the names and residences of those who are appointed for the first year, are

Name.	Residence.
Alexander Dunsmuir	San Francisco, California.
James Dunsmuir	Victoria, British Columbia.
James T. Boyd	San Francisco, California.
Cavalier Hamilton Jouett	San Francisco, California.
Walter Alexander Gompertz	Berkeley, California.

SIXTH: The amount of its capital stock is One Million Dollars, divided into ten thousand shares, of the par value of one hundred dollars each.

SEVENTH: The amount of said Capital Stock which has been actually subscribed is one million dollars, and the following are the names of the persons by whom the same has been subscribed, to wit:

Names of Subscribers.	No. of Shares.	Amount.
Alexander Dunsmuir	4,998	$499,800
James Dunsmuir	4,988	499,800
James T. Boyd	2	200
Cavalier H. Jouett	1	100
Walter Alexander Gompertz	1	100

[83]

In Witness Whereof, we have hereunto set our hands and seals, this Twenty-seventh day of February, A. D. 1896.

JAMES DUNSMUIR. (Seal)
ALEXANDER DUNSMUIR. (Seal)
JAMES T. BOYD. (Seal)
CAVALIER HAMILTON JOUETT (Seal)
WALTER ALEXANDER GOMPERTZ. (Seal)

Signed and sealed by James Dunsmuir in the presence of

CHAS. E. POOLEY.

By ALEXANDER DUNSMUIR,
JAMES T. BOYD,
CAVALIER HAMILTON JOUETT and
WALTER ALEXANDER GOMPERTZ,
JAMES MASON.

State of California,
City and County of San Francisco,—ss.

On this seventh day of March, in the year one thousand eight hundred and ninety-six, before me, James Mason, a Notary Public, in and for the said City and County, duly commissioned and sworn, personally appeared, Alexander Dunsmuir, James T. Boyd, Cavalier Hamilton Jouett and Walter Alexander Gompertz, known to me to be the persons described

in whose names are subscribed to and who executed the within and annexed instrument and they duly acknowledged that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

United States Consulate,
British Columbia.
Victoria, B. C. Feb'y 27th, 1896.

I, M. R. Eure, Vice-Consul of the United States, at Victoria, B. C., do hereby certify that on this 27th day of February, 1896, James Dunsmuir, who is known to me to be [84] the same individual who executed the annexed written instrument, personally appeared before me and acknowledged that he had signed and sealed said instrument freely and voluntarily for the purpose and consideration therein stated.

In witness whereof, I have hereunto set my hand, and affixed the seal of the Consulate, at Victoria, B. C., this day and year next above written, and of the independence of the United States the one hundred and twentieth. [Seal]

M. R. EURE,
Vice-Consul of the United States.

State of California,
City and County of San Francisco,—ss.

I, C. F. Curry, County Clerk of the City and

County of San Francisco, State of California, hereby certify the foregoing to be a full, true and correct copy of the original Articles of Incorporation of the R. Dunsmuir's Sons' Company filed in my office on the 9th day of March, A. D. 1896.

ATTEST my hand and my official seal, this 9th day of March, A. D. 1896.

[Seal] C. F. CURRY,
County Clerk.
By Wm. R. A. Johnson,
Deputy County Clerk.

[Endorsed]: Filed in the Office of the County Clerk of the City and County of San Francisco, State of California, this 9th day of March, A. D. 1896. C. F. Curry, County Clerk. By Wm. R. A. Johnson, Deputy Clerk.

[Endorsed]: Filed in the office of the Secretary of State the 10th day of March, A. D. 1896. L. H. Brown, Secretary of State. By W. T. Sesnon, Deputy. [85]

Record Book 87, page 317.
No. 20175.
Frank C. Jordan, Secretary of State, Frank H. Cory, Deputy.

STATE OF CALIFORNIA,
Department of State.

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Incorporation of R. Dunsmuir's Sons Company with the certified copy of the original now on file in my

office, and that the same is a correct transcript therefrom, and of the whole thereof. Also that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office in Sacramento, California, the 4th day of January, A. D. 1912.

[Seal] FRANK C. JORDAN,
Secretary of State.
By Frank H. Cory,
Deputy."

Mr. PIER.—I wish to introduce a certified copy of the Will of Alexander Dunsmuir. This is a certified copy of the authenticated copy of the last will and testament of Alexander Dunsmuir, restored by order of Court on the 4th day of January, 1912. That is the record in the Superior Court, where the will was probated, where probate was made upon the estate of Alexander Dunsmuir here upon an authenticated copy of the will. I have here a certified copy of that restored will. I wish to introduce that in evidence. In this will Alexander Dunsmuir refers to him as of San Francisco, California. [86]

Mr. THORNE.—We object to it upon the ground that it is immaterial, irrelevant and incompetent and an attempt to impeach a judgment *in rem,* a conclusive judgment; it amounts to a collateral attack upon the judgment. On the further ground that the terms of the will were merged in the decree. The question of domicile cannot be proven in this way. No evidence can be introduced by means of this will to impeach the decree admitting this will to probate, and

also the decree of distribution, because the will and the terms of the will are all merged in the decree of distribution. I have a number of cases on that point your Honor.

The COURT.—Yes, that would be all right if the judgment was conclusive, but I hold that the judgment in probate is not conclusive on this Court at all on the question of residence.

Mr. THORNE.—We take an exception.

Exception No. 3.

The document was admitted in evidence, marked Defendant's Exhibit "B" and reads as follows:

[Defendant's Exhibit "B"—Will of Alexander Dunsmuir.]

"I, Alexander Dunsmuir, of San Francisco, California, United States of America, hereby revoke all wills and testamentary dispositions by me heretofore made and declare this to be my last will and testament. I give, devise and bequeath all my property, both real and personal, wheresoever situate, unto my brother, James Dunsmuir, of Victoria, Province of British Columbia, absolutely, and I appoint the said James Dunsmuir sole executor of this my will. In testimony whereof I have hereunto set my hand this twenty-first day of December, one thousand eight hundred and ninety-nine.

ALEXANDER DUNSMUIR. [87]

Signed by the Testator as and for his last will and testament in the presence of us, who at his request, in his presence, and in the presence of each other,

have hereunto subscribed our names as witnesses.

JAS. LOWE, Sausalito, Cal.

JAMES P. TAYLOR, Oakland, Cal.

Endorsed: filed Jan 4, 1912. H. I. Mulcrevy, Clerk. By E. B. Gilson, Deputy Clerk.

Office of the County Clerk of the City and County of San Francisco.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full, true and correct copy of the authenticated copy of the last will and testament of Alexander Dunsmuir, restored by order of Court on the 4th day of January, A. D. 1912, in the matter of the Estate of Alexander Dunsmuir, deceased, now on file and of record in my office.

Witness my hand and the seal of said court this 9th day of January, A. D. 1912.

[Seal] H. I. MULCREVY,
County Clerk.
By H. G. Benedict,
Deputy County Clerk."

Mr. PIER.—I want to introduce in evidence a certified copy of the marriage license of Alexander Dunsmuir and Josephine Wallace, in which he describes himself as a resident of Alameda County, California. This is a certified copy from the County Recorder of the County of Contra Costa, where the marriage license was issued. [88]

Mr. THORNE.—This is objected to upon the ground that it is immaterial, and irrelevant and is an attempt to impeach collaterally the judgment of the

Superior Court of the City and County of San Francisco, State of California, namely, the decree of distribution in the Estate of Alexander Dunsmuir, Deceased, wherein the domicile of the decedent in that proceeding is determined as being in British Columbia and furthermore, upon the ground that this marriage license is not evidence of any fact concerning residence for the reason that it is not sworn to or signed by Alexander Dunsmuir, and it does not appear that any authority was given by Alexander Dunsmuir to sign the same.

Mr. PIER.—I will establish that by another witness; that is, the authority.

The COURT.—What do you mean, you will establish what?

Mr. PIER.—Counsel says there is no evidence of any authority being given.

The COURT.—The law requires first certain things to be stated in applying for a marriage license; among other things, residence. That is the act of a public officer, and a public officer is presumed to do his duty, and to write the fact in accordance with the fact as it is presented to him. The objection is overruled.

Mr. THORNE.—We take an exception.

Exception No. 4.

The document was admitted in evidence, marked Defendant's Exhibit "C" and reads as follows:

[Defendant's Exhibit "C"—Marriage License of Alexander Dunsmuir and Josephine Wallace.]

"MARRIAGE LICENSE.

State of California, County of Contra Costa.

THESE PRESENTS are to authorize and license any [89] Justice of the Supreme Court, Judge of the Superior Court, Justice of the Peace, Priest or Minister of the Gospel of any denomination, to solemnize within said county the marriage of Alexander Dunsmuir, native of British Columbia, aged 46 years, a resident of Alameda County, California, and Josephine Wallace, native of New York, aged 38 years, a resident of Alameda Co. California, they being of sufficient age to contract marriage.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Superior Court of said County, this 19th day of December, A. D. 1899.

J. E. RODGERS,
County Clerk.
By ————,
Deputy Clerk.

State of California,
County of Contra Costa.

This Certifies, That I, Wm. C. Shaw, a Clergyman of the County of Contra Costa, united in Marriage, at San Pablo in the County of Contra Costa on this twenty-first day of December, A. D. 1899, Alexander

Dunsmuir, native of British Columbia, aged 46 years, residing at San Leandro, California, and Josephine Wallace, native of New York, aged 38 years, residing at San Leandro, California; as authorized by the within license and in accordance with the laws of the State of California.

W. C. SHAW,
(Official character) Clergyman.

(10c revenue stamp)
A. E. D.
Jan'y 22, 1900.
Witnesses:
JAMES P. TAYLOR,
Residing at Oakland, California.
JAS. LOWE,
Residing at Sausalito, California.

Recorded at request of J. P. Taylor this 22d day of January, A. D. 1900, at 35 minutes past 1 P. M.

A. E. DUNKEL,
County Recorder.

State of California,
County of Contra Costa,—ss. [90]

I, M. H. Hurley, County Recorder in and for said County and State, do hereby certify that the hereto attached and foregoing paper is a full, true and correct copy of the Record of an Instrument as the same appears in Volume 5 Marriage Certificates, page 399, Records of said County, now in my custody.

(Testimony of Joseph Herrscher.)

Witness my hand and official seal, at Martinez, this 15th day of November, 1909.

[Seal] M. H. HURLEY,
County Recorder in and for Contra Costa County,
State of California."

[Testimony of Joseph Herrscher, for Defendant.]

JOSEPH HERRSCHER, called as a witness for defendant, after being duly sworn, testified as follows:

I am in the general merchandise business in San Francisco and San Leandro. I knew Alexander Dunsmuir in his lifetime. I have talked with him about California at various times. He told me he was going to make his home in California; that he made his home there. He never dwelt upon San Francisco, only San Leandro. I recollect various conversations I had with him. I was City Treasurer at that time and also a member of the Board of Education and he took quite a liking to me in talking matters over, and in delivering meats. He was a very peculiar man; he did not want everybody going in his premises and any orders given at the store at that time he wanted me to deliver them personally. At that time he spoke of making his home in California and liking the country here.

On cross-examination the witness testified as follows:

He never told me where he had resided prior to [91] going to San Leandro. He never went into any details about his whereabouts. He only conversed in reference to the climate and the country

(Testimony of Joseph Herrscher.)

and the surroundings. He did not tell me he intended to make his home in San Leandro. He said he had made his home there, he was going to stay there, and that he liked it. I don't know that this property belonged to Mrs. Wallace; he always mentioned it as his. I do know that she had an interest in it. I do not know the details of the estate at all. I am just explaining to you what Mr. Dunsmuir told me himself. I did not know that this was not his home in the sense that it did not belong to him. He never told me anything about that. I do not know when Mr. Dunsmuir was married, but it must have been in 1889. I could not say whether he told me this before or after he was married. I know the lady was living up there; I had conversations with her and she gave me orders. I called her Mrs. Dunsmuir. I cannot tell exactly the date or month when I first called her Mrs. Dunsmuir, but I know it was in 1889. I do not remember when they were married. I think they bought the place up there in 1889. I mean 1899,—I made a mistake in the year. I don't think the house was completed during the time I saw him; I think it was in course of construction. I think he did live in that large house. I went there myself with the wagon. That was not after his death. I was there after he died, but I recollect the time he was living in the house. I cannot say whether or not he was living in the old house when the place was bought for Mrs. Wallace. I saw him in the new house several times. The first time I met him I drove up to the place to get orders and I [92] met

(Testimony of Joseph Herrscher.)

him at the gate. I asked him if he was Mr. Dunsmuir and he said yes. Then we talked over matters and got acquainted. He told me this was the only country he liked. He did not say he was going to make his home there. But he said, "I have bought this place and this is my home." I don't know what brought out that conversation. I have no interest in this matter at all. I am here telling just what the man told me. I went up there once or twice a week for orders for groceries and general merchandise. He was not very pleasant when I approached him first, but when we got acquainted and he knew my standing in the community we were friends. I do not remember when Alexander Dunsmuir was married. I knew, however, that he was married. He told me to see his wife about the orders. He told me that in 1899, about six or seven months before he died. I remember seeing an account of the marriage in the papers.

[Testimony of Jerome F. Trivett, for Defendant.]

JEROME F. TRIVETT, called as a witness for defendant, after being duly sworn, testified as follows:

I am the rector or priest in charge of the Church of the Advent in Oakland. The priest in charge before me was Rev. Wm. Carson Shaw. (Witness being shown a register of marriages, continued:) That is the register that has been kept in my church of the marriages performed there by Mr. Shaw prior to my having charge of the Church. I being an official in charge of the Church have the official custody

(Testimony of Jerome F. Trivett.)

of this record. As demanded by our laws, this record is the regular record kept by the priest in charge of my Church and this book is kept in pursuance of the regulations of the Church. The record shows a record of marriage of Alexander Dunsmuir and Josephine Wallace on Thursday, December 21st, 1899, at page 108, Volume 2 of the parish records. [93]

Counsel for defendant thereupon offered said record in evidence as to the marriage of Alexander Dunsmuir and Josephine Wallace. Counsel for plaintiff objected to the introduction of the same as immaterial, irrelevant and incompetent and an attempt to impeach the decree of the Superior Court of the State of California, in and for the City and County of San Francisco, on account of jurisdiction, wherein it is decreed that the domicile of the decedent was in British Columbia, and upon the further ground that the attempt to introduce this evidence amounts to a collateral attack upon that judgment. The objection was overruled and an exception taken.

Exception No. 5.

The following entry in said register of marriages was then read in evidence:

[Exhibit—Entry in Register of Marriages of the Church of the Advent—December 21, 1899.]

"MARRIAGES.

"Thursday, December 21, 1899.

"Place: San Pablo. No. 2. Names: Alexander Dunsmuir and Josephine Wallace. Age of Alexander Dunsmuir, 46. Age of Josephine Wallace, 38. The residence of each is San Leandro. The parents'

(Testimony of Jerome F. Trivett.)

name and residence is given as San Leandro. Signature of Clergyman: W. C. Shaw. Witnesses and Remarks: James P. Taylor and Jas. Lowe."

On cross-examination the witness testified as follows:

I have been rector of the Church of the Advent since April, 1906. Personally I know nothing concerning the facts of this marriage. I know nothing about it except as finding it in the record-book. I did not see the entry made.

[Testimony of James P. Taylor, for Defendant.]

JAMES P. TAYLOR, called as a witness for defendant, after being duly sworn, testified as follows: **[94]**

I knew Alexander Dunsmuir in his lifetime. I first became acquainted with him about 1877 or 1878. I was one of his witnesses at his marriage to Josephine Wallace. I made the affidavit upon which this marriage license was obtained. In that affidavit I stated that he was a native of British Columbia and a resident of Alameda County. I had business relations here with him in San Francisco. These relations commenced in 1878. From that time my acquaintance with him was intimate. I called upon him several times at the Occidental Hotel and I knew him at the Grand Hotel. I also called on him at San Leandro. I believe he had the place over in San Leandro about a year. It was bought in Mrs. Wallace's name. They lived over there before they built the new house. I don't think he ever lived in the new house. They lived in the old house, but it

(Testimony of James P. Taylor.)

is my recollection that they did not live in the new house. The new house was not completed. There were times when he was traveling in Europe and at other times I should say he lived here in San Francisco about three-quarters of the year. He went away on trips and on his trips north he would spend a good deal of time in hunting. At times he stated to me that his home was in Victoria. My memory is not as good now as it was some time ago. I do not remember at how late a date his statement as to his home was made to me. I do not recollect that he ever said anything about intending to go to Victoria and stay there permanently. His home in the sense that we speak of our birth place and where our parents live was in Victoria. He was born in Nanaimo. I should say that his active business interests were here in San Francisco, that is, those that he had to look after personally. **[95]**

On cross-examination the witness testified as follows:

Mr. Dunsmuir had a regular business manager here during all the time that he was here.

Mr. THORNE (Counsel for Plaintiff):

Q. You say he was absent about a year in Europe; do you remember when that was?

A. I could not say.

Q. Do you remember about when it was?

A. No, I really could not say. I know he was absent but I cannot remember the time. He referred at times to Victoria as his home. I cannot say that I ever referred to his home as San Francisco.

(Testimony of James P. Taylor.)

On redirect examination the witness testified as follows:

Mr. Dunsmuir requested me to go and procure this marriage license for him, and told me to take such steps as were necessary to secure the license. In that connection I took it that he was a resident of San Leandro. I do not remember now whether he gave me any special authorization on that point or instructions on that matter. I could not be sure of it at this time. The only way in which he spoke of San Leandro as his residence was when I used to come over to San Francisco and frequently go back on the boat with him and then take the train and then sometimes go out to spend the evening and night with him, he would say in the office sometimes, "Well, James, let us go home." He said it in that colloquial or general way. After this invitation I would go over with him to San Leandro.

On recross-examination the witness testified as follows:

I cannot say so far as my memory goes that I had any **[96]** special instructions to put in the affidavit that his residence was Alameda County. I do not know that I knew at that time that he regarded Victoria as his home.

The COURT.—Q. If you knew that his residence was in Victoria you would not have sworn that his residence was in Alameda, would you?

A. No, I certainly would not. Alexander Dunsmuir lived at the Occidental and also at the Grand Hotels in San Francisco. I visited him there. At

(Testimony of James P. Taylor.)

the time he was living in San Leandro, he was living with Mrs. Wallace, but he was not married. After the marriage, they only lived there until the next day, when they left for New York. I may have testified before the British Consul on a commission issued by the Superior Court of the Province of British Columbia in the case of Hopper against Dunsmuir that Alexander Dunsmuir always told me that his residence was Victoria. I cannot recollect at this time.

[Testimony of Obadiah Rich, for Defendant.]

OBADIAH RICH, called as a witness for defendant, after being duly sworn, testified as follows:

During the years 1885 to 1890 I was manager of the Grand Hotel. Alexander Dunsmuir lived there part of that time. He was there from time to time. Mr. PIER (Counsel for Defendant):

Q. He would not keep his rooms there permanently?

A. Not always; no. He had three rooms. Josephine Wallace did not live with him there at that time. She had room 7, which was separate from his suite. I do not remember how long he lived there.

[Testimony of P. M. Nevin, for Defendant.]

P. M. NEVIN, called as a witness for defendant, after being duly sworn, testified as follows:

I knew Alexander Dunsmuir in his lifetime. I knew him in San Francisco and San Leandro. I was employed [97] by him both in San Francisco

(Testimony of P. M. Nevin.)

and San Leandro. I worked at the place in San Leandro, which was a place of about 315 acres. I understood this place was Mrs. Wallace's. I worked there first in the capacity of coachman. I went over there on the 12th of March, 1899, and I stayed there through his lifetime. I never heard him make any statement as to where his home was. I never heard him speak of San Leandro as his home, except that when I would take him to the train he would tell me he would be home on such and such a train, telling me what train he would be home on. I went to work for him here in San Francisco in 1893 as a teamster in the business. The only place I ever knew of him living at was at the Occidental. I heard he was living there. I knew he was at the Grand. I did not take particular notice as to how much time of each year he would spend at San Francisco. Every once in a while I would see him and then he would go away and then I would not see him for two or three months or six months. While he was at the Grand Hotel I worked for him as a regular teamster in the business.

On cross-examination the witness testified as follows:

I remember when Mr. Dunsmuir was married to Mrs. Wallace. Mr. Dunsmuir never lived at the new house. I was there all the time while the house was being constructed. The new house was not completed when they got married. It was not fit for occupancy when they got married. It was not fit for occupancy until after Mrs. Dunsmuir came

(Testimony of P. M. Nevin.)

home. The next day after their marriage they went to New York. They did not come back to San Leandro at all after they were married. They remained in Oakland that night and went **[98]** to New York the next day, I understand.

The plaintiff complaining of said judgment presents this Bill of Exceptions.

[Order Settling and Allowing Bill of Exceptions, etc.].

I, William C. Van Fleet, United States District Judge, in and for the Northern District of California, and being the Judge before whom and by whom the above-entitled action was tried, do hereby certify that the foregoing bill of exceptions, duly proposed and agreed upon by the counsel of the respective parties, is a true and correct bill of exceptions, that the same has been presented in due time, and is hereby settled, allowed and approved as and for the Bill of Exceptions in the above-entitled action, and is hereby made a part of the record herein.

Dated: February 7th, 1914.

WM. C. VAN FLEET.
United States District Judge.

[Stipulation Re Bill of Exceptions.]

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above-entitled action that the foregoing Bill of Exceptions has been presented in time and that the same may be approved, allowed and settled as and for the Bill of Exceptions in said action, and that

the same shall be made a part of the record in said action, all objections to said Bill of Exceptions and to the writ of error sued out by the plaintiff in this action to the United States Circuit Court of Appeals, Ninth Judicial Circuit, by reason of the fact that said Bill of Exceptions was not settled during the term of court at which the above-entitled action was tried or by reason of the fact that the same was not settled prior to the suing out of said **[99]** writ of error by plaintiff, being hereby expressly waived.

Dated February 7th, 1914.

ANDREW THORNE and
WALTON C. WEBB,
Attorneys for Plaintiff.
JNO. W. PRESTON,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Feb'y 7, 1914. Walter B. Maling, Clerk. **[100]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,703.

JAMES DUNSMUIR,
Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in place of AUGUST E. MUENTER, Collector of Internal Revenue),
Defendant.

Petition for Writ of Error.

James Dunsmuir, the plaintiff in the above-entitled action, feeling himself aggrieved by the final judgment of the above-entitled court entered in the above-entitled action on the 12th day of May, 1913, whereby it was adjudged that the plaintiff take nothing by said action and that the defendant therein have and recover of and from the plaintiff his costs of suit, now comes by Andrew Thorne and Walton C. Webb, Esqs., his attorneys, and hereby petitions said Court for an order allowing him, the said plaintiff, to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit under and according to the laws of the United States in that behalf made and provided, to have reviewed therein the said judgment and other matters and things set forth in the assignment of errors accompanying this petition and for an order fixing the amount of security to be given by plaintiff in error, conditioned as the law directs; and prays that such writ of error do issue and that, upon giving such bond as may be required, all further proceedings in this Court be suspended, stayed and superseded until determination **[101]** of said writ of error by said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

And your petitioner will ever pray, etc.

Dated November, 10th, A. D. 1913.

JAMES DUNSMUIR,
Plaintiff.

By ANDREW THORNE and
WALTON C. WEBB,
His Attorneys.

[Endorsed]: Filed Nov. 10, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[102]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,703.

JAMES DUNSMUIR,
Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in place of AUGUST E. MUENTER, Collector of Internal Revenue),
Defendant.

Assignment of Errors.

Now comes James Dunsmuir, the plaintiff in the above-entitled action, by Andrew Thorne and Walton C. Webb, Esqs., his attorneys, and assigns and specifies the following errors, as the errors upon which he will rely and which he will urge upon his writ of error herein to reverse the judgment of the above-entitled court entered on May 12th, 1913, in the above-entitled action, to wit:

I.

The Court erred in overruling plaintiff's objection

to the introduction in evidence of Defendant's Exhibit "A," being certified copy of the Articles of Incorporation of R. Dunsmuir's Sons Company, which was offered in evidence on behalf of defendant upon his own case.

Upon plaintiff's case and prior to the offer in evidence of the above-mentioned certified copy of the Articles of Incorporation of said R. Dunsmuir's Sons Company, there had been offered upon plaintiff's behalf and admitted in evidence by the Court, an exemplified copy of the decree of settlement of final account and of final distribution in the matter of the estate of Alexander Dunsmuir, deceased, in the Superior Court of the State of California, in and for the City and [103] County of San Francisco, which document is marked Plaintiff's Exhibit No. 1, and reads as follows:

"In the Superior Court of the State of California, in and for the City and County of San Francisco.

DEPARMENT 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

DECREE OF SETTLEMENT OF FINAL ACCOUNT AND OF FINAL DISTRIBUTION.

James Dunsmuir, as Executor of the Last Will and Testament of Alexander Dunsmuir, deceased, in and for the State of California, having on the 23d day of May, 1901, rendered and filed herein a final account and report of his administration of said Estate in the State of California, which said account was for a final settlement, and said James Dunsmuir, as Executor as aforesaid, having filed with

said account a petition for the final distribution of said Estate, and said account and petition having on the 3d day of June, 1901, come on regularly to be heard, due proof having been made to the satisfaction of the Court that notice has been given of the settlement of said account and of the hearing of said petition in the manner and for the time required by law;

And it appearing that said account of said Executor as rendered and filed herein is in all respects true and correct and that it is supported by proper vouchers;

That the said residue of money in the hands of said Executor belonging to the Estate of said deceased at the time of filing said final account was the sum of $25,120.70, gold coin of the United States;

That since the rendition of said final account said Executor has not received to or for the use or benefit of said Estate any additional sum of money or property whatever **[104]** and has not made any disbursements whatever for the account of said Estate, and that for that reason he has not presented or filed herein any account supplemental to his said final account so heretofore rendered and filed herein;

That the sum of $6,595.15 has been heretofore expended by him as necessary expenses of administration, the vouchers whereof together with a statement of such disbursements have been presented and filed, and said statement is now settled and allowed and all of said payments are hereby approved by this Court;

And it appearing that all claims and debts against

said decedent and said Estate and all taxes against said Estate have been fully paid and discharged;

That said testator, Alexander Dunsmuir, died on the 31st day of January, 1900, at the City, County and State of New York, and at the time of his death he was a British subject and a resident of and domiciled at Victoria, Province of British Columbia, but temporarily residing in the City and County of San Francisco, as appears from the evidence, both oral and documentry, introduced upon the hearing of the petition for distribution, and that said testator at the time of his death left property in the City and County of San Francisco, State of California;

That said Alexander Dunsmuir left a Last Will and Testament dated December 21st, A. D. 1899, wherein said James Dunsmuir was appointed the Executor thereof;

That said Last Will and Testament of said Alexander Dunsmuir, deceased, was duly approved, allowed and admitted to probate in the Province of British Columbia by a judgment and decree dated February 26th, 1900, in the Supreme Court of British Columbia, and that said Last Will and Testament was executed according to the laws of the State of California, and also according to the law of the domicile of said testator. [105] And it appearing that said judgment and proof, allowance and admission to probate of said Last Will and Testament of said deceased in said Province of British Columbia has never been in whole or in part appealed from, revoked, set aside, modified or in any wise affected or at all, but that the same has become and is now absolute;

That the aforesaid Supreme Court of British Columbia was at all the times herein mentioned and is a court of competent and general jurisdiction and was at all said times and is a court of competent jurisdiction in the premises to pronounce, give and make such decree and the proof, allowance and admission to probate of the aforesaid will so duly and regularly given and made on the 26th day of Februtry, 1900, and that said Court was and is the domiciliary forum in the premises;

That on the 26th day of April, A. D. 1900, said James Dunsmuir, the person named in said Will as Executor thereof and a person interested in said Will produced and filed in this court a copy of the Will of said Alexander Dunsmuir, deceased, and the probate thereof, duly authenticated, together with his petition for the issuance to him of letters testamentary thereon;

That thereafter such proceedings were had and taken in this court in the matter of said Estate of said deceased that on or about the 9th day of May, 1900, it was ordered, adjudged and decreed by the judgment and decree of this Court that said copy of the Will of said Alexander Dunsmuir, deceased, and the probate thereof so duly authenticated and produced and filed in this court on the 26th day of April, 1900, as aforesaid, be admitted to probate as the Last Will and Testament of said Alexander Dunsmuir, deceased, with the same force and effect as if said Will had been first admitted to [106] probate in this State, and that such judgment and decree was regularly given and made;

That by virtue of said judgment and decree last

aforesaid letters testamentary were ordered to be issued to said James Dunsmuir upon his giving a bond in the sum of $308,000 as required by law and that thereafter on the 14th day of May, 1900, letters testamentary were duly issued to said James Dunsmuir, as Executor as aforesaid;

That said James Dunsmuir did give said bond so required of him by law for the faithful performance and execution of the duties of the trust as such Executor, with sufficient surety;

That said bond was in the manner and form and duly approved as required by law and that said James Dunsmuir duly qualified as such Executor and entered upon the discharge of his duties as such and that ever since said time has been and now is the sole Executor of the said Last Will and Testament of said deceased in and for the State of California;

That immediately after his said appointment and qualification as Executor as aforesaid he caused to be published in a newspaper of general circulation printed, published and circulated in said City and County of San Francisco a notice to the creditors of said decedent and all persons having claims against said Alexander Dunsmuir to exhibit and present their said claims against the said deceased according to law;

That more than ten months have elapsed since the first publication of said notice to creditors;

That a decree showing due and legal notice to the creditors of and all persons having claims against said decedent and his said Estate has been heretofore duly and regularly given, made and entered by this court;

That all debts of said deceased and of said Estate and all expenses of administration thereof and all taxes that have attached to or accrued against said Estate and its property [107] have been paid and discharged and that said Estate is now in a condition to be closed.

And it appearing in and by the terms of said Last Will and Testament of said deceased that all the estate and property of the said deceased, both real and personal wheresoever situate, was given, devised and bequeathed to James Dunsmuir, a brother of said deceased;

And it appearing to the satisfaction of this Court that said Alexander Dunsmuir, deceased, at the time of his death left him surviving as his only heirs at law the following persons, that is to say:

Josephine Dunsmuir, widow of said deceased, and Joan Olive Dunsmuir, mother of said deceased;

That said James Dunsmuir, as Executor as aforesaid, has this day filed in this court in writing his waiver and renunciation of all commissions and compensation for his services as such Executor and has also made such waiver and renunciation in open court at this hearing;

And it appearing that said Alexander Dunsmuir devised and bequeathed all of his property to his brother, James Dunsmuir, but according to previous understanding and agreement said James Dunsmuir was to make suitable provision for said Josephine Dunsmuir, widow as aforesaid, during her life;

And it appearing that the said James Dunsmuir has since the death of said Alexander Dunsmuir in

furtherance of said previous understanding and agreement entered into an agreement with said Josephine Dunsmuir, in full settlement of her claims as widow upon the Estate of said decedent, whereby he has bound himself to pay her an annuity during her lifetime. [108]

And it appearing by the report of the Hon. Finlay Cook, the appraiser appointed by this Court to appraise all interests in this Estate subject to the collateral inheritance tax, that the present cash value of the annuity for the benefit of the said Josephine Dunsmuir, widow, as aforesaid, is in excess of the value of the property passing to James Dunsmuir, and that, therefore, the property passing to said James Dunsmuir is not subject to the payment of any collateral inheritance tax;

It is now, therefore, ordered that out of and from the rest, residue and remainder of the property now remaining in the hands of said James Dunsmuir, as Executor as aforesaid, there be paid the following sums of money, that is to say:

For estimated expenses of closing the said Estate of said deceased, five dollars;

To Messrs. Wilson & Wilson, as attorneys for said Executor in the administration of said Estate the sum of five thousand dollars, to be paid to them in full for all professional services rendered in said Estate and to said Executor as such to the date hereof, leaving a balance of $20,115.70 now in the hands of said Executor belonging to said Estate;

And it appearing to the satisfaction of this Court that said estate is now in a condition to be closed and

finally distributed to the persons lawfully entitled thereto;

Now, therefore, it is ordered, adjudged and decreed that said final account of said James Dunsmuir, as Executor of the Last Will and Testament of said Alexander Dunsmuir, deceased, be and the same is hereby settled, allowed and approved as presented and filed herein. [109]

It is further ordered, adjudged and decreed that all the rest, residue and remainder of said Estate hereinafter particularly described and any other property known or not known or discovered which may belong to the said Estate of said Alexander Dunsmuir, deceased, or in which said Estate may have any interest, be and the same is hereby distributed to James Dunsmuir, said brother of said deceased, and that the same is not subject to the payment of any collateral inheritance tax;

The following is a particular description of the said residue of said Estate referred to in this decree and of which distribution is now ordered, as aforesaid, that is to say:

Twenty thousand one hundred and fifteen dollars and seventy cents in cash;

Four thousand nine hundred and ninety-eight shares of the capital stock of the R. Dunsmuir's Sons' Company, a corporation, organized and existing under the laws of the State of California.

Done in open court this 3d day of June, A. D. 1901.

JAS. M. TROUTT,
Judge.

Recorded October 3d, 1901.

[Endorsed]: Filed Jun. 3, 1901. Wm. A. Deane, Clerk. By V. F. Northrop, Deputy Clerk."

Upon defendant's case, as above stated, there was offered in evidence upon his behalf the above-mentioned certified copy of the Articles of Incorporation of R. Dunsmuir's Sons Company, which reads as follows:

"ARTICLES OF INCORPORATION
of the
R. Dunsmuir's Sons Company. **[110]**

Know all men by these Presents, that we, whose names are hereunto subscribed, have this day voluntarily associated ourselves for the purpose of forming, and do together form a corporation, under the laws of the State of California.

And we hereby certify,

First: The name of the incorporation is

R. Dunsmuir's Sons Company.

Second: The purposes for which it is formed, are, to acquire, own, hold, improve, lease and dispose of lands, and interests in lands; to acquire, build, construct, own, hold, manage and use wharves, docks, basins, dry-docks, piers and warehouses, or any interest in the same; to borrow and loan money; to engage in, and carry on the business of commerce, foreign and domestic; to build, equip, furnish, or buy and sell, or charter ships and vessels, and navigate the same; to purchase, take, hold, and use shares of the capital stock of other corporations, or membership therein; to purchase, acquire and use personal property of every name and description, to act as agents for other persons or corporations in the transaction

of business; to locate, acquire, hold, develop and operate mines of precious or valuable ores, metals and other substances, and deal in and with the products of mines of every kind or nature; to sell, convey, grant, mortgage, hypothecate or otherwise dispose of property, real or personal, and generally, to do and transact any business for which individuals may lawfully associate themselves, and which are not prohibited by the laws of the State of California.

Third: The place where its principal business is to be transacted is the City and County of San Francisco, in the State of California.

Fourth: The term for which it is to exist is fifty-years.

Fifth: The number of its Directors is five, and the [111] names and residences of those who are appointed for the first year, are

Name.	Residence.
Alexander Dunsmuir,	San Francisco, California.
James Dunsmuir,	Victoria, British Columbia.
James T. Boyd,	San Francisco, California.
Cavalier Hamilton Jouett,	San Francisco, California.
Walter Alexander Gompertz,	Berkeley, California.

Sixth: The amount of its capital stock is One Million Dollars, divided into ten thousand shares, of the par value of one hundred dollars each.

Seventh: The amount of said Capital Stock which has been actually subscribed is one million dollars, and the following are the names of the persons by whom the same has been subscribed, to wit:

Names of Subscribers.	No. of Shares.	Amount.
Alexander Dunsmuir	4,998	$499,800
James Dunsmuir	4,998	499,800
James T. Boyd	2	200
Cavalier H. Jouett	1	100
Walter Alexander Gompertz	1	100

In witness whereof, we have hereunto set our hands and seals, this Twenty-seventh day of February, A. D. 1896.

JAMES DUNSMUIR. (Seal)
ALEXANDER DUNSMUIR. (Seal)
JAMES T. BOYD. (Seal)
CAVALIER HAMILTON JOUETT. (Seal)
WALTER ALEXANDER GOMPERTZ. (Seal)

Signed and sealed by James Dunsmuir in the presence of

CHAS. E. POOLEY,
By ALEXANDER DUNSMUIR,
JAMES T. BOYD,
CAVALIER HAMILTON JOUETT and
WALTER ALEXANDER GOMPERTZ,
JAMES MASON. [112]

State of California,
City and County of San Francisco,—ss.

On this seventh day of March, in the year one thousand eight hundred and ninety-six, before me, James Mason, a notary public, in and for the said City and County, duly commissioned and sworn, personally appeared, Alexander Dunsmuir, James T. Boyd, Cavalier Hamilton Jouett and Walter Alexander Gompertz, known to me to be the persons described in, whose names are subscribed to and who executed the

within and annexed instrument and they duly acknowledged that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

United States Consulate,
British Columbia,
Victoria, B. C., Feb'y 27th, 1896.

I, M. R. Eure, Vice-Consul of the United States, at Victoria, B. C., do hereby certify that on this 27th day of February, 1896, James Dunsmuir, who is known to me to be the same individual who executed the annexed written instrument, personally appeared before me and acknowledged that he had signed and sealed said instrument freely and voluntarily for the purpose and consideration therein stated.

In witness whereof, I have hereunto set my hand, and affixed the seal of the Consulate, at Victoria, B. C., this day and year next above written, and of the Independence of the United States the one hundred and twentieth. (Seal)

M. R. EURE,
Vice-Consul of the United States." [113]

Upon said last-mentioned document being so offered in evidence the following proceedings occurred:

"Mr. PIER (Counsel for Defendant).—I want at this time to introduce in evidence a certified copy,

certified by The Secretary of State, of the Articles of Incorporation of the R. Dunsmuir's Sons & Company, which gives the residence of Alexander Dunsmuir, at San Francisco, California. The Code specifically provides that each of the incorporators shall give his name and residence. This was done in the regular course of business.

The COURT.—Is it sworn to?

Mr. PIER.—The Articles of Incorporation were acknowledged before James Mason.

Mr. THORNE (Counsel for Plaintiff).—We object to the introduction of this document in evidence upon the ground that it is immaterial, irrelevant and incompetent, and further that it is an attempt to impeach the judgment of a court of competent jurisdiction, namely, the Superior Court of the State of California, in and for the City and County of San Francisco, adjudging that Alexander Dunsmuir was a resident domiciled in Victoria at the time of his death (referring to the above-mentioned decree of settlement of final account and of final distribution in the matter of the estate of said Alexander Dunsmuir, deceased), and that being a judgment *in rem,* this amounts to a collateral attack upon that judgment.

The COURT.—The objection is overruled.

Mr. THORNE.—We take an exception."

The said document was thereupon admitted in evidence.

II.

The Court erred in overruling plaintiff's objection to the introduction in evidence of Defendant's Exhibit "B," being certified copy of the will of Alexander Dunsmuir, deceased, which [114] was

offered in evidence on behalf of defendant upon his own case.

Upon plaintiff's case and prior to the offer in evidence of the above-mentioned certified copy of the will of said Alexander Dunsmuir, deceased, there had been offered upon plaintiff's behalf and admitted in evidence by the Court, the exemplified copy of the decree of settlement of final account and of final distribution in the matter of the estate of Alexander Dunsmuir, deceased, hereinabove set forth in assignment number I.

Upon defendant's case, as above stated, there was offered in evidence upon his behalf the above-mentioned certified copy of the will of said Alexander Dunsmuir, deceased, which reads as follows:

"I, Alexander Dunsmuir, of San Francisco, California, United States of America, hereby revoke all wills and testamentary dispositions by me heretofore made and declare this to be my last will and testament. I give, devise and bequeath all my property, both real and personal, wheresoever situate, unto my brother, James Dunsmuir, of Victoria, Province of British Columbia, absolutely, and I appoint the said James Dunsmuir sole executor of this my will. In testimony whereof I have hereunto set my hand this twenty-first day of December, One thousand eight hundred and ninety-nine.

ALEXANDER DUNSMUIR.

Signed by the Testator as and for his last will and testament in the presence of us, who at his request, in *this* presence, and in the presence of each other, have

hereunto subscribed our names as witnesses.

JAS. LOWE,
Sausalito, Cal.
JAMES P. TAYLOR,
Oakland, Cal. **[115]**

[Endorsed]: Filed Jan. 4, 1912. H. I. Mulcrevy, Clerk. By E. B. Gilson, Deputy Clerk."

Upon said last mentioned document being so offered in evidence the following proceedings occurred:

"Mr. PIER (Defendant's Counsel).—I wish to introduce a certified copy of the Will of Alexander Dunsmuir. This is a certified copy of the authenticated copy of the last will and testament of Alexander Dunsmuir, restored by order of court on the 4th day of January, 1912. This is the record in the Superior Court where the will was probated, where probate was made upon the estate of Alexander Dunsmuir here upon an authenticated copy of the will. I have here a certified copy of that restored will. I wish to introduce that in evidence. In this will Alexander Dunsmuir refers to him as of San Francisco, California.

Mr. THORNE (Counsel for Plaintiff).—We object to it upon the ground that it is immaterial, irrelevant and incompetent and an attempt to impeach a judgment *in rem*, a conclusive judgment (referring to the above-mentioned decree of settlement of final account and of final distribution in the matter of the estate of said Alexander Dunsmuir, deceased). It amounts to a collateral attack upon the judgment (referring to said decree). On the further ground

that the terms of the will were merged in the decree (referring to said decree). The question of domicile cannot be proven in this way. No evidence can be introduced by means of this will to impeach the decree admitting this will to probate, and also the decree of distribution, because the will and the terms of the will are all merged in the decree of distribution. I have a number of cases on that point, your Honor.

The COURT.—Yes, that would be all right if the judgment was conclusive, but I hold the judgment in probate is not conclusive **[116]** on this Court at all on the question of residence.

Mr. THORNE.—We take an exception."

The said document was thereupon admitted in evidence.

III.

The Court erred in overruling plaintiff's objection to the introduction in evidence of Defendant's Exhibit "C," being certified copy of the marriage license of Alexander Dunsmuir and Josephine Wallace, which was offered in evidence on behalf of defendant upon his own case.

Upon plaintiff's case and prior to the offer in evidence of the above mentioned certified copy of the marriage license of Alexander Dunsmuir and Josephine Wallace, there had been offered upon plaintiff's behalf and admitted in evidence by the Court, the exemplified copy of the decree of settlement of final account and of final distribution in the matter of the estate of Alexander Dunsmuir, deceased, hereinabove set forth in assignment number 1.

Upon defendant's case, as above stated, there was offered in evidence upon his behalf the above-mentioned certified copy of the marriage license of said Alexander Dunsmuir and Josephine Wallace, which reads as folllows:

"MARRIAGE LICENSE.

State of California. County of Contra Costa.

These presents are to authorize and license any Justice of the Supreme Court, Judge of the Superior Court, Justice of the Peace, Priest or Minister of the Gospel of any denomination, to solemnize within said county the marriage of Alexander Dunsmuir, native of British Columbia, age 46 years, a resident of Alameda County California, and Josephine Wallace, native of New York, aged 38 years, a resident of Alameda Co., California, they being of sufficient age to contract marriage. **[117]**

In Witness whereof, I have hereunto set my hand and affixed the Seal of the Superior Court of said County, this 19th day of December, A. D. 1899.

J. E. RODGERS,
County Clerk.
By ————,
Deputy Clerk.

State of California,
County of Contra Costa.

This certifies, that I, Wm. C. Shaw, a clergyman of the County of Contra Costa, united in Marriage at San Pablo in the County of Contra Costa on this Twenty-first day of December, A. D. 1899, Alexander Dunsmuir, native of British Columbia, aged 46 years, residing at San Leandro, California, and

Josephine Wallace, native of New York, aged 38 years, residing at San Leandro, California; as authorized by the within license, and in accordance with the laws of the State of California.

W. C. SHAW,
(Official character) Clergyman.

(10c revenue stamp.)
A. E. D.
Jan'y 22, 1900.
Witnesses:
JAMES P. TAYLOR,
Residing at Oakland, California.
JAS. LOWE,
Residing at Sausalito, California.

Recorded at request of J. P. Taylor this 22d day of January, A. D. 1900, at 35 minutes past 1 P. M. A. E. Dunkel, County Recorder."

Upon said last mentioned document being so offered in evidence the following proceedings occurred:

"Mr. PIER (Counsel for Defendant).—I want to introduce in evidence a certified copy of the marriage license of Alexander Dunsmuir and Josephine Wallace, in which he describes himself as a resident of Alameda County, California. This is a certified **[118]** copy from the County Recorder of the County of Contra Costa, where the marriage license was issued.

Mr. THORNE (Counsel for Plaintiff).—This is objected to upon the grounds that it is immaterial, and irrelevant and is an attempt to impeach collaterally the judgment of the Superior Court of the

City and County of San Francisco, State of California, namely, the decree of distribution in the Estate of Alexander Dunsmuir, Deceased, wherein the domicile of the decedent in that proceeding is determined as being in British Columbia and furthermore, upon the ground that this marriage license is not evidence of any fact concerning residence for the reason that it is not sworn to or signed by Alexander Dunsmuir, and it does not appear that any authority was given by Alexander Dunsmuir to sign the same.

Mr. PIER.—I will establish that by another witness; that is the authority.

The COURT.—What do you mean—you will establish what?

Mr. PIER.—Counsel says that there is no evidence of any authority being given.

The COURT.—The law requires first certain things to be stated in applying for a marriage license; among other things, residence. That is the act of a public officer, and a public officer is presumed to do his duty, and to write the fact in accordance with the fact as it is presented to him. The objection is overruled.

Mr. THORNE.—We take an exception."

The said document was thereupon admitted in evidence.

IV.

The Court erred in overruling plaintiff's objection to the introduction in evidence of the following entry in the register of marriages of the Church of the Advent in Oakland, which entry was offered in evidence

on behalf of defendant upon his own [119] case, viz:

"MARRIAGES.

"Thursday, December 21, 1899.

"Place: San Pablo. No. 2. Names: Alexander Dunsmuir and Josephine Wallace. Age of Alexander Dunsmuir, 46. Age of Josephine Wallace, 38. The residence of each is San Leandro. The parents' name and residence is given as San Leandro. Signature of Clergyman: W. C. Shaw. Witnesses and Remarks: James P. Taylor and J. A. S. Lowe."

Upon plaintiff's case and prior to the offer in evidence of said entry in said register of marriages, there had been offered upon plaintiff's behalf and admitted in evidence by the Court, the exemplified copy of the decree of settlement of final account and of final distribution in the matter of the estate of Alexander Dunsmuir, deceased, hereinabove set forth in assignment number 1. Upon said entry in said register of marriages being offered in evidence upon defendant's case, as aforesaid, counsel for plaintiff objected to the introduction of the same as immaterial, irrelevant and incompetent and as an attempt to impeach the above mentioned decree, wherein it is decreed that said Alexander Dunsmuir, deceased, was domiciled in British Columbia, and to collaterally attack the same. The objection was overruled and an exception taken by plaintiff. The said entry was thereupon admitted in evidence.

V.

The Court erred in finding, as set forth in its

opinion rendered in the above-entitled action on May 12th, 1913, that Alexander Dunsmuir was not a resident of Victoria, British Columbia, at the time of his death.

VI.

The Court erred in finding, as set forth in its opinion rendered in the above-entitled action on May 12th, 1913, that Alexander Dunsmuir was not domiciled in British Columbia at the **[120]** time of his death.

VII.

The Court erred in finding, as set forth in its opinion rendered in the above-entitled action in May 12th, 1913, that Alexander Dunsmuir was a resident of the State of California, United States of America, at the time of his death.

VIII.

The Court erred in finding, as set forth in its opinion rendered in the above entitled action on May 12th, 1913, that Alexander Dunsmuir was domiciled in the State of California, United States of America, at the time of his death.

IX.

The evidence is insufficient and there is no evidence to sustain the finding of the Court as set forth in its opinion rendered in the above-entitled action on May 12th, 1913, that Alexander Dunsmuir was not a resident of Victoria, British Columbia, at the time of his death, for the reason that the evidence shows that Alexander Dunsmuir was a resident of Victoria, British Columbia, at the time of his death.

X.

The evidence is insufficient and there is no evidence, to sustain the finding of the Court as set forth in its opinion rendered in the above-entitled action on May 12th 1913, that Alexander Dunsmuir was not domiciled in British Columbia at the time of his death, for the reason that the evidence shows that Alexander Dunsmuir was domiciled in British Columbia, at the time of his death.

XI.

The evidence is insufficient and there is no evidence, to sustain the finding of the Court as set forth in its opinion rendered in the above-entitled action on May 12th, 1913, that Alexander Dunsmuir was a resident of the State of California, **[121]** United States of America, at the time of his death, for the reason that the evidence shows that Alexander Dunsmuir was a resident of Victoria, British Columbia, at the time of his death.

XII.

The evidence is insufficient and there is no evidence, to sustain the finding of the Court as set forth in its opinion rendered in the above-entitled action on May 12th, 1913, that Alexander Dunsmuir was domiciled in the State of California, United States of America, at the time of his death, for the reason that the evidence shows that Alexander Dunsmuir was domiciled in British Columbia, at the time of his death.

WHEREFORE, said James Dunsmuir, the plaintiff in said action and plaintiff in error upon said

writ of error, prays that the judgment of said Court be reversed, etc.

Dated November 10th, 1913.

ANDREW THORNE,
WALTON C. WEBB,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 10, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[122]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of AUGUST E. MUENTER, Collector of Internal Revenue),

Defendant.

Order Allowing Writ of Error [and Fixing Amount of Bond].

Upon motion of Andrew Thorne and Walton C. Webb, Esqs., attorneys for the plaintiff in the above-entitled action, and upon filing by plaintiff of a petition for a writ of error and assignment of errors herein;

IT IS HEREBY ORDERED, that a writ of error be, and the same is hereby, allowed to the plaintiff in this action to the United States Circuit Court of

Appeals for the Ninth Judicial Circuit, to have reviewed therein the judgment heretofore entered herein and other matters and things in said petition and assignment set forth;

AND IT IS FURTHER ORDERED that the amount of the bond to be given by said plaintiff upon such writ of error be and the same is hereby fixed at the sum of $500.00, such bond to be conditioned as required by law.

Dated November 10th, A. D. 1913.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Nov. 10, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[123]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,703.

JAMES DUNSMUIR,
Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of AUGUST E. MUENTER, Collector of Internal Revenue),
Defendant in Error.

Writ of Error Bond.

KNOW ALL MEN BY THESE PRESENTS: That SOUTHWESTERN SURETY INSURANCE COMPANY, a corporation duly organized and

existing under and by virtue of the laws of the State of Oklahoma, United States of America, and duly licensed and authorized to execute and act as surety on bonds and undertakings and to give and execute this bond and undertaking, is, upon behalf of the above-named James Dunsmuir, plaintiff in error in this action, held and firmly bound unto the above-named Joseph J. Scott, Collector of Internal Revenue (substituted in place of August E. Muenter, Collector of Internal Revenue), defendant in error in this action, in the full and just sum of Five Hundred ($500.00) Dollars, lawful money of the United States of America, to be paid to the said defendant in error, his attorneys, successors, administrators, executors, or assigns, for which payment well and truly to be made said SOUTHWESTERN SURETY INSURANCE COMPANY, binds itself, its successors and assigns firmly by these presents.

The condition of the above obligation is such that:

WHEREAS, in the above-entitled, action, wherein the above-named plaintiff in error was plaintiff, and the above-named August E. Muenter, Collector of Internal Revenue, was [124] defendant (in whose place and stead the above-named Joseph J. Scott, Collector of Internal Revenue, was thereafter substituted as defendant), final judgment was entered in the above-entitled Court on the 12th day of May, 1913, adjudging that the plaintiff take nothing by said action and that the defendant therein have and recover of and from the plaintiff his costs of suit; and

WHEREAS, the above-named plaintiff in error has obtained a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Judi-

cial Circuit, to reverse said judgment, and has been directed to give on such writ of error a bond in the sum of Five Hundred ($500.00) Dollars, such bond to be conditioned as required by law;

NOW, THEREFORE, if the said James Dunsmuir, plaintiff in error in this action, shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation shall be void, else to remain in full force and virtue.

AND IT IS HEREBY expressly agreed by said SOUTHWESTERN SURETY INSURANCE COMPANY, that, in case of a breach of any condition of this bond, the above-named District Court of the United States, in and for the Northern District of California, may, upon notice to said SOUTHWESTERN SURETY INSURANCE COMPANY, of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which it is bound to pay on account of such breach and render judgment therefor against it and award execution therefor.

IN WITNESS WHEREOF the said SOUTHWESTERN SURETY INSURANCE COMPANY, has duly caused its name and seal to be hereunto affixed by its Resident Vice-President and Resident Assistant Secretary, at San Francisco, California, this TENTH day of November, A. D. 1913.

SOUTHWESTERN SURETY INSURANCE COMPANY,

By EDWARD P. SPENGLER,

Resident Vice-president. [125]

[Seal] And by A. MULLEN,

Resident Assistant Secretary.

The foregoing bond is hereby approved this 10th day of November, A. D. 1913.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Nov. 10, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [126]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,703.

JAMES DUNSMUIR,
Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of AUGUST E. MUENTER, Collector of Internal Revenue),
Defendant.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred and twenty-six (126) pages, numbered from 1 to 126, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remain of record and on file in the office of the Clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing re-

turn to writ of error is $80.20, that said amount was paid by Andrew Thorne and Walton C. Webb, Esqrs., attorneys for plaintiff and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of February, A. D. 1914.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California. [127]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,703.

JAMES DUNSMUIR,
Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of AUGUST E. MUENTER, Collector of Internal Revenue),
Defendant in Error.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, to the Honorable the Judges of the District Court of the United States, in and for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in

the said District Court, before you, or some of you, between James Dunsmuir, plaintiff in error, and Joseph J. Scott, Collector of Internal Revenue (Substituted in place of August E. Muenter, Collector of Internal Revenue), defendant in error, a manifest error hath happened to the great damage of the said James Dunsmuir, plaintiff in error, as by his complaint appears.

And we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings [128] aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 10th day of December, 1913, next, in the said United States Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM C. VAN FLEET, District Judge of the United States, this the 10th day of November, in the year of Our Lord One

Thousand Nine Hundred and Thirteen.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States in and for the Northern District of California.

Allowed this 10th day of November, 1913, by
WM. C. VAN FLEET,
Judge. [129]

Service of the within Writ of Error, and Receipt of a copy thereof, is hereby admitted this 10th day of November, 1913.

BENJ. L. McKINLEY,
United States Attorney,
Attorney for Defendant in Error.

[Endorsed]: No. 14,703. In the District Court of the United States, in and for the Northern District of California, Second Division. James Dunsmuir, Plaintiff in Error, vs. Joseph J. Scott, etc., Defendant in Error. Writ of Error. Filed Nov. 10, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Answer to Writ of Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is made in the writ of error, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, at the day and place contained in the writ of error, in a certain schedule

nue), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Received and filed March 10, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time to and Including January 10, 1914, to File Record, etc., in Appellate Court.]

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

JAMES DUNSMUIR,
Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of AUGUST E. MUENTER, Collector of Internal Revenue),
Defendant in Error.

ORDER UNDER RULE 16, SECTION 1, ENLARGING TIME WITHIN WHICH TO FILE RECORD ON WRIT OF ERROR AND TO DOCKET CAUSE.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the plaintiff in error in the above-entitled cause may have, and he is hereby granted, to and including the 10th day of January,

No. 2386.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES DUNSMUIR,
Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of August E. Muenter, Collector of Internal Revenue),
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

This action was brought by James Dunsmuir, admitted at all times to be domiciled in British Columbia, a legatee under the will of Alexander Dunsmuir, deceased, to recover from the United States Collector of Internal Revenue for the First Collection District of the State of California the sum of $2,968.80 paid by him under protest to such Collector as a tax under the provisions of the War Revenue Act of June 13th, 1898, upon the legacy received by him as such legatee. The recovery of the tax is sought, as alleged in the complaint, upon two grounds, first: that said

Alexander Dunsmuir, deceased, was domiciled in British Columbia at the time of his death (it having been held, as this Court undoubtedly knows, by the Supreme Court of the United States, in the cases of *Eidman* vs. *Martinez,* 184 U. S. 578, and *Moore* vs. *Ruckgaber,* 184 U. S. 593, that the portion of the personal estate situated in this country of a person domiciled in a foreign country is not subject to the legacy tax imposed by said War Revenue Act), and second: that said legacy has no taxable value by reason of the fact that it is burdened with an annuity of $25,000.00. All of the material allegations of the complaint are admitted by the defendant except the above referred to allegations that said Alexander Dunsmuir, deceased, was domiciled in British Columbia at the time of his death and that said legacy has no taxable value by reason of the fact that it is burdened with an annuity of $25,000.00. The defendant does deny that he collected the tax by force and duress and that the same was involuntarily paid, but, as he admits the allegations of the complaint as to his demand for the tax, payment of the same under written protest (setting forth the grounds thereof) and the presentation of a claim to the Commissioner of Internal Revenue for the refunding of the tax and the rejection thereof, such denials are merely denials of conclusions of law, the admitted allegations being sufficient under the decisions of the United States Courts (*Wright* vs. *Blakeslee,* 101 U. S. 174; *Stewart* vs. *Barnes,* 153 U. S. 456, and *Schmitt* vs. *Trowbridge,* 21 Fed. Cases No. 12468) to show that the

tax was involuntarily paid and to entitle the plaintiff to recover the tax if the same be illegal.

It will be seen, therefore, that there were only two issues to be passed upon by the District Court, namely: the question as to whether or not said Alexander Dunsmuir, deceased, was domiciled in British Columbia at the time of his death, and the further question as to whether or not said legacy had no taxable value by reason of the fact that it was burdened with an annuity of $25,000.00. Although the trial Court made no findings, the judgment in favor of the defendant necessarily found both of these questions in his favor. If either thereof had been found in favor of the plaintiff, judgment must have gone for him.

It is our intention to raise the point that there is not sufficient evidence, and, in reality, no evidence at all, to support either of these implied findings. Of course, in raising this point we are not unmindful of the rule in the United States Courts to the effect that the question of the insufficiency of the evidence to support the judgment cannot be raised where there are no findings. We respectfully submit, however, that this rule is not, and should not be held to be, applicable to our case. The reason for the rule undoubtedly is that, where there are no findings, the appellate court cannot usually know what facts were found in favor of the plaintiff and what facts in favor of the defendant, as the lower Court may have found certain, although not all, of the facts in favor of the party who is given judgment. This being so, the rule has been adopted that where there are no find-

ings the question of the insufficiency of the evidence to support the judgment cannot be raised. But the reason of this rule does not apply to our case, and, when the reason fails, the rule itself fails. As above stated, we do not need any findings to determine what the District Court decided. It necessarily found against both of the above mentioned allegations of the complaint, to-wit: that said Alexander Dunsmuir, deceased, was domiciled in British Columbia at the time of his death and that said legacy had no taxable value by reason of the fact that it was burdened with an annuity of $25,000.00.

We have searched diligently in order to find authorities upon the question as to whether or not findings are necessary in order to raise the question of the insufficiency of the evidence where, without findings, it is evident as to what the Court did actually find, but we have been unable to find any authorities whatsoever, either one way or the other. We respectfully submit, however, that a rule of this character should rather be limited than extended in its application, and is not to be applied to a case like ours, which really does not come within its meaning or object.

We are not offering as a legal excuse that we overlooked the rule of the District Court (which, as this Court undoubtedly knows, is exactly contrary to our state statute) requiring a party to request findings on or before the submission of the cause for decision. We simply desire to call attention to the fact that this rule was inadvertently overlooked by us. And we would request this Court to examine the evidence to ascer-

tain whether or not there is any evidence to support either of the two above mentioned findings necessarily involved in the judgment rendered by the Court in favor of the defendant. If the Court does this it is doing no more than it would have to do if the District Court had made express findings upon these two issues. This being so, we feel we are not asking this Court to do something that it cannot conscientiously or legally do.

There are, in addition to the specifications of error hereinafter mentioned, three points we desire to make on this writ of error, the determination of any one of which in our favor requires a reversal of the judgment. They are as follows:

FIRST.

THE DECREE OF FINAL DISTRIBUTION MENTIONED IN PARAGRAPH 5 OF THE COMPLAINT (TRANSCRIPT, PAGE 3), THE ALLEGATIONS OF WHICH PARAGRAPH OF THE COMPLAINT ARE ADMITTED BY THE DEFENDANT, CONCLUSIVELY DETERMINES THAT SAID ALEXANDER DUNSMUIR, DECEASED, WAS DOMICILED IN BRITISH COLUMBIA AT THE TIME OF HIS DEATH.

SECOND.

THERE IS NO EVIDENCE TO SUPPORT THE FINDING OF THE DISTRICT COURT THAT SAID ALEXANDER DUNSMUIR, DE-

CEASED, WAS NOT DOMICILED IN BRITISH COLUMBIA AT THE TIME OF HIS DEATH.

THIRD.

THERE IS NO EVIDENCE TO SUPPORT THE FINDING OF THE DISTRICT COURT THAT SAID LEGACY HAD A TAXABLE VALUE EVEN THOUGH IT WAS BURDENED WITH AN ANNUITY OF $25,000.00.

The specifications of error upon which we rely are directed against certain rulings of the District Court admitting in evidence certain documents over our objections that the same were inadmissible as being in contradiction of the above mentioned decree of distribution which was conclusive as to the fact that said Alexander Dunsmuir was domiciled in British Columbia at the time of his death. It will be seen, therefore, that a determination of the first of our above mentioned points will determine also the correctness or incorrectness of these rulings. It is apparent also that a knowledge of the contents of said decree of distribution is necessary before said rulings can be passed upon. We will, therefore, give a brief summary of the provisions of said decree before stating the specifications of error upon which we rely.

The decree, which was introduced in evidence and is contained in the bill of exceptions, is found on pages 32 to 42 inclusive of the transcript. The decree was made by the Superior Court of the City and County of San Francisco, State of California, on

the 3rd day of June, 1901, and finds that said Alexander Dunsmuir, deceased, died on January 31st, 1900, at the City, County and State of New York, being at the time of his death a British subject and a resident of and domiciled at Victoria, Province of British Columbia, but temporarily residing in the City and County of San Francisco. It further finds that said Alexander Dunsmuir, deceased, left a will dated December 21st, 1899, which will was originally probated in British Columbia and was thereafter, by exemplified copy of the same and of the probate thereof, admitted to probate on ancillary proceedings in said Superior Court of the City and County of San Francisco, State of California. The decree further finds that the said will bequeaths all of the property of said Alexander Dunsmuir, deceased, to said James Dunsmuir, the plaintiff and plaintiff in error in this action, but according to a previous understanding and agreement that he was to make suitable provision for Josephine Dunsmuir, the widow of said deceased, during her life, which understanding and agreement had been consummated by said James Dunsmuir executing with said Josephine Dunsmuir an agreement in full settlement of her claims as widow upon the estate of said deceased, whereby he bound himself to pay her an annuity during her lifetime. It further finds that, by reason of said agreement, the then cash value of the annuity was greater than the value of the property passing to said James Dunsmuir under said will and that on account thereof the same was not subject to the payment of an in-

heritance tax, and distributed said property to said James Dunsmuir. This property is the property upon which the tax involved in this suit was levied.

The above mentioned specifications of error are as follows:

I.

That the Court erred in admitting in evidence, over plaintiff's objection that the same was inadmissible as being in contradiction of the above mentioned decree of distribution, defendant's exhibit "A," being certified copy of the Articles of Incorporation of R. Dunsmuir's Sons Company (set forth on pages 136-139 of the transcript), which are dated February 27th, 1896, are signed and acknowledged by said Alexander Dunsmuir and recite his residence as being "San Francisco, California."

II.

That the Court erred in admitting in evidence, over plaintiff's objection that the same was inadmissible as being in contradiction of the above mentioned decree of distribution, defendant's exhibit "B" being certified copy of the will of Alexander Dunsmuir, deceased (set forth at pages 141-142 of the transcript), which is signed by him, is dated December 21st, 1899, and recites as follows: "I, Alexander Dunsmuir, of San Francisco, California, United States of America, hereby revoke," etc.

III.

That the Court erred in admitting in evidence, over plaintiff's objection, that the same was inadmissible as being in contradiction of the above mentioned decree of distribution and that the same was not evidence of any fact concerning residence for the reason that it was not sworn to nor signed by said Alexander Dunsmuir and it did not appear that any authority was given by him to sign the same, defendant's exhibit "C" being certified copy of the marriage license of Alexander Dunsmuir and Josephine Wallace (set forth at pages 144-145 of the transcript), which states the residence of Alexander Dunsmuir as being Alameda County, California.

IV.

That the Court erred in admitting in evidence, over plaintiff's objection that the same was inadmissible as being in contradiction of the above mentioned decree of distribution, the entry in the register of marriages of the Church of the Advent in Oakland, reciting that Alexander Dunsmuir was a resident of San Leandro. (Page 47 of the transcript.)

We will now proceed to discuss the above mentioned points and specifications of error in the order in which they are set forth.

FIRST POINT.

The above mentioned decree of distribution establishes conclusively that Alexander Dunsmuir, deceased, was domiciled in British Columbia at the

time of his death. The facts in regard to this decree are set forth in paragraph 5 of the complaint (transcript, page 3), which facts are admitted by the answer of the defendant, who simply contents himself with alleging in paragraph V of his answer (transcript, page 14), that said Alexander Dunsmuir, deceased, died a resident of the City and County of San Francisco, State of California, and that, if ancillary administration was allowed in the Superior Court of the City and County of San Francisco, State of California, it was without jurisdiction and of no effect. But the defendant, as we shall subsequently show, is not in a position to attack these probate proceedings.

The allegations of said paragraph 5 of the complaint (transcript, page 3), which allegations are, as above stated, admitted by the answer, are that the will of Alexander Dunsmuir, deceased, was, by duly authenticated copy, on the 9th day of May, 1900, admitted to probate in the Superior Court of the City and County of San Francisco, State of California, and that thereafter and after due proceedings in ancillary administration, the estate of said deceased in the State of California was by said decree of distribution distributed to the plaintiff; and that said decree has become final and absolute. And the said decree of distribution (transcript, pages 32-42), as above mentioned, finds that Alexander Dunsmuir, deceased, was domiciled in British Columbia at the time of his death. It was necessary that the Superior Court of the City and County of San Francisco, State of Cali-

fornia, should so find in order that that Court should have jurisdiction to admit the will of said deceased to probate on ancillary proceedings. For, under the statutes of the State of California if Alexander Dunsmuir, deceased, had been a resident of the City and County of San Francisco, as claimed by the defendant, said Superior Court would not have had jurisdiction to probate the will of the deceased by an authenticated copy thereof. In that event the will must have been originally probated in the City and County of San Francisco, State of California. (See *Estate of Clark,* 148 Cal. 108.) The said decree having become final and absolute, as alleged in said paragraph 5 of the complaint and admitted by the answer, it cannot now, under the decisions of the Supreme Court of the State of California, be collaterally attacked on the ground of lack of jurisdiction as it is not void upon its face. See the cases of *Dunsmuir* vs. *Coffey,* 148 Cal. 137, and *Estate of Dunsmuir,* 149 Cal. 67, involving these very probate proceedings that are now under discussion, which had been attacked, as they are here attacked, on the ground that Alexander Dunsmuir, deceased, was a resident of the City and County of San Francisco, State of California, at the time of his death and not of British Columbia. In these cases the Supreme Court of the State of California held, however, in answer to this contention, that, as the proceedings had become final and showed upon the face thereof that the Superior Court of the City and County of San Francisco, State of California, had jurisdiction to probate the authenticated copy of the

will of Alexander Dunsmuir, deceased, they could not be collaterally attacked on the ground of lack of jurisdiction.

If these proceedings are unassailable collaterally by everyone else, can the United States, acting through the defendant, attack them in this collateral proceeding? Surely not, as the United States is bound by a decree of a State Court just as an ordinary suitor is bound and in the same way and to the same extent. (See *State of Iowa* vs. *Carr,* 191 Fed. 257; *Waples' Proceedings in Rem.,* Sec. 112, p. 159, and *Fendall* vs. *U. S.,* 14 Court of Cl. 247.) This becomes doubly obvious when we remember that the defendant in order to show that he had a right to collect the tax must rely upon these very ancillary probate proceedings in the Superior Court of the City and County of San Francisco, State of California, which he is now seeking to attack.

It cannot be assumed that there were any original probate proceedings in the City and County of San Francisco, as would have been necessary if defendant's contention that the decedent was a resident of said City and County was correct, since it appears by the complaint, which allegations are admitted by the answer, that said ancillary probate proceedings in the City and County of San Francisco have become final and absolute. Furthermore, there is no claim made that there ever were any original probate proceedings in the City and County of San Francisco. It must be taken as established, therefore, that there were no other probate proceedings and that said ancillary

probate proceedings are the only probate proceedings to which the defendant could look as a basis for the collection of the tax. It is true that in paragraph 4 of the complaint it is alleged that the will was originally probated in British Columbia, but, as defendant particularly and specifically denies the allegations of this paragraph and in addition denies that the will could be originally probated in British Columbia, and, as there is no claim that the property in California was distributed or affected by the probate proceedings in British Columbia, the defendant cannot base the collection of the tax upon these proceedings.

Why is it necessary that the collection of the tax must be based upon these probate proceedings in the Superior Court of the City and County of San Francisco? For the reason that neither the Collector of Internal Revenue nor the District Court of the United States has any probate powers. See the case of *McCoy* vs. *Gill,* 156 Fed. Rep., p. 985, to which case we shall have occasion later to refer more fully, where the Court said:

> "Only by probate is a writing in its nature testamentary established in Massachusetts as the will of its maker. The Circuit Court of the United States is not a court of probate and is without jurisdiction to determine that a writing which for any reason has failed of probate in the proper state court is the last will of Jordan."

Without these probate proceedings it cannot be ascertained to whom his property shall go or whether

Alexander Dunsmuir, deceased, left a will or died intestate, for, although he left a document purporting to be a will that document may be invalid as such, and, until the probate court has determined that fact, it cannot be known whether he died testate or intestate or to whom his property shall go.

This being so, if the defendant be allowed to attack these probate proceedings on the ground that the Court had no jurisdiction, there would be absolutely nothing upon which to base the collection of the tax sued for in this case and the same would have to be returned to plaintiff.

If the defendant is willing to accept these probate proceedings for the purpose of showing that certain property was distributed to James Dunsmuir so that the United States may collect a tax thereon, he must accept them in toto. The defendant cannot say that he will accept the proceedings as a determination that Alexander Dunsmuir, deceased, died testate and left a will, under the provisions of which certain property is given to James Dunsmuir, and, at the same time, say, as to another question decided by the Court, that is: that the deceased was domiciled in British Columbia at the time of his death (which finding was necessary in order that the Court might have jurisdiction), that he will not accept such finding but will contend that the probate court had absolutely no jurisdiction in the matter. The defendant cannot accept the probate proceedings for one purpose and reject them for another. If he relies upon them for the collection of the tax, as he

must do, he must accept them as being good and valid proceedings had within the jurisdiction of the Court.

The above mentioned case of *McCoy* vs. *Gill,* 156 Fed. Rep., p. 985, decided by the Circuit Court of the United States for the First Circuit (District of Massachusetts) is, we think, decisive of this point for which we are contending. And it is the only decision we have been able to find upon the question, either one way or the other. That case was brought to recover from the United States Collector of Internal Revenue a legacy tax levied under the War Revenue Act of June 13th, 1898, and paid under protest. The decedent's name, which was Jordan, died on September 29th, 1898, leaving a document purporting to be a will. This document was offered for probate to the Probate Court of Massachusetts, which Court admitted the document to probate. Subsequently on appeal the Supreme Court of the State of Massachusetts set aside the order admitting the will to probate. Thereafter pursuant to the statutes of the State of Massachusetts a compromise was entered into between the different parties interested in the estate whereby the estate was distributed in a manner other than that provided in the document purporting to be the decedent's will. The Collector of Internal Revenue contended that a legacy tax must be paid based upon the provisions made in the purported will, which tax amounted to $3,060.67, the legatees contending that the tax should be based upon the property distributed to them in accordance

with the compromise which amounted to $1,781.25. The legatees having paid the amount demanded by the Collector under protest, brought suit to recover the difference amounting to $1,279.42. The Circuit Court of the United States held that the Government of the United States must rely upon the decree of distribution in order to collect the tax at all and that, therefore, it must accept that decree as final and could not attempt to go behind it and collect the tax according to the provisions of the will and that by reason thereof the plaintiffs were entitled to recover. As this case is so conclusive of our position that the probate proceedings must be accepted by defendant, we desire to quote in full what the Court says upon this question. It is as follows:

> "The government contends that the tax should be assessed according to the tenor of the writing offered for probate, on the ground that this is the will of Jordan, rather than the compromise subsequently effected by those interested in his estate. But, whether the compromise be deemed a will or not in the purview of the war revenue act under no circumstances can a writing which has not been admitted to probate in the proper court of Massachusetts be made the basis of an inheritance tax in the federal courts. Only by probate is a writing in its nature testamentary established in Massachusetts as the will of its maker. The Circuit Court of the United States is not a court of probate, and is without jurisdiction to determine that a writing which for any reason has failed of probate in the proper state court is the last will of Jordan. Either

the compromise is to be deemed his will within the purview of the war revenue act, or he must be deemed to have died intestate. This was the view necessarily taken by the government itself. In collecting the tax the government necessarily set up the compromise. It did not seek payment from the persons named as executors in the original writing. They never had in charge any distributive shares of personal property. It sought payment from the persons appointed executors by the probate court by virtue of the compromise, inasmuch as the latter made distribution of Jordan's estate. A writing, which may have been in Jordan's possession, does not become his will merely because it has been vainly offered for probate. There is some difficulty, indeed, in holding that a compromise which has been made by the parties to the controversy, and has been approved by the supreme court of probate, is thereby made the will of Jordan. Unless, however, the shares distributed in accordance with its provisions be deemed for the purpose of the war revenue act to pass 'by will or by the intestate laws,' the United States can collect no tax whatsoever upon the shares. This result seems inadmissible."

SECOND POINT.

Assuming, only for the sake of argument, that the above mentioned decree of distribution is not conclusive, there is no evidence to support the finding of the District Court that Alexander Dunsmuir, deceased, was not domiciled in British Columbia at the time of his death. It is alleged in paragraph 3 of

the complaint (transcript, page 2) that said Alexander Dunsmuir, deceased, was born in British Columbia, which allegation is admitted by the answer. It is alleged in paragraph 12 of the complaint (transcript, page 7) that said deceased was at all times a British subject. This allegation is denied in the answer, but it was admitted by the defendant at the trial, as shown by the bill of exceptions (transcript, pages 94-95), that said deceased was at all times a British subject. It is also admitted that Alexander Dunsmuir, deceased, was at all times, except at the time of his death, domiciled in British Columbia, as the allegations of paragraph 3 of the complaint (transcript, page 2) to the effect that British Columbia was at all times the domicile of said deceased are admitted by the answer except that defendant denies that the domicile was such at the time of his death. (Transcript, page 13.) It is conceded, therefore, that said Alexander Dunsmuir, deceased, was at all times a British subject and was born in British Columbia, and that his domicile was at all times, except at the time of his death, in British Columbia. His domicile of origin being British Columbia, such domicile is presumed to continue until it is shown that he acquired another domicile, the burden of showing which is upon the party who asserts the change of domicile, in this case such party being the defendant. This should be especially true where the defendant has admitted that the domicile was British Columbia at all times except at the time of death. In order to effect a change of domicile it is not suffi-

cient to show that a person, leaving the domicile of origin, resided elsewhere. In addition to such fact it must be shown that he left the domicile of origin with the intention of taking up a new domicile. See the following quotations from the admirable work on the law of domicile by Mr. Jacobs:

> "Section 109. The British and American authorities attach great importance and peculiar qualities to domicil of origin, and lay down with respect to it two principles, which have passed into maxims, namely,
>
> "(1) Domicil of origin clings closely; and
>
> "(2) Domicil of origin reverts easily. Both of these principles are universally received in Great Britain and America."
>
> "Section 114. Every man's domicil of origin must be presumed to continue until he has acquired another sole domicil by actual residence with the intention of abandoning his domicil of origin. This change must be *animo et facto,* and the burden of proof unquestionably lies upon him who asserts the change."

Also see volume 14 of Cyc., pages 851-852, where it is said:

> "A domicil of origin is retained until changed by acquiring another. So each successive domicile of choice continues until another is obtained and the acquisition of a new domicile at the same instant terminates the preceding one.
>
> "The acquisition of the new domicile must have been completely perfected and hence there must have been a concurrence both of the *factum* of removal and the *animus* to remain in the new

locality before the former domicile can be considered lost."

See also the case of *Hascall* vs. *Hafford,* 107 Tenn. 355, (89 Am. St. Rep. 952). In this last case it is held that "In order to be a resident of a place, the "person must have acquired a domicile there; and "to constitute domicile there must be a residence and "an intention of the person to make the place where "he resides his home." At page 362 of the opinion in this case it is said:

> "The principal facts relied on to show that deceased had acquired a domicile in this state are 1. that he lived here for several years; and 2. that he once voted in a primary election; and 3. that he was once elected alderman of the town of Gates. It should be stated, however, that he refused to accept the office of alderman and declined to serve. But we think the declarations of deceased in respect of his home and his intention to return to it outweigh the fact of voting in a primary or running for office, as indicating the real purpose of the party. It was held in *Divine* v. *Dennis,* 1 Shannon's Tenn. Cas. 378, that facts indicating that a party was a permanent citizen of Tennessee—such as voting in our elections, suing and being sued in our courts, paying taxes, and renting land, etc.—are overcome by his repeated declarations that he was a citizen of Kentucky, and of his purpose to return to that state when his government contract was finished, etc."

Now let us look at the evidence to see what, if any,

evidence there is to show that Alexander Dunsmuir, deceased, changed his domicile from British Columbia to the State of California or that his domicile ever was in the State of California. The testimony in regard to the question of domicile is in substance as follows:

TESTIMONY FOR PLAINTIFF.

There was first admitted in evidence the above mentioned decree of distribution (transcript, pages 32-42), which finds as above stated (transcript, page 34), that Alexander Dunsmuir was at the time of his death a British subject and a resident of and domiciled at Victoria, Province of British Columbia, but temporarily residing in the City and County of San Francisco, State of California.

Mountford S. Wilson testified (transcript, pages 43-44) in substance as follows: I am an attorney at law and knew Alexander Dunsmuir for about ten years before he died. Alexander Dunsmuir was a resident of British Columbia. The bulk of the Dunsmuir business consisted of coal mines and large tracts of land in British Columbia. Their business down here in San Francisco was merely a sales agency for their coal and a branch of their business. Alexander Dunsmuir was the manager of the business here in San Francisco, and spent the greater part of his time in this state. I think his rooms were mostly in the Pacific Union Club. During the latter part of his life he bought a place, something like 50 or 100 acres, at San Leandro and built a house on the property

costing about $30,000 or $40,000. This place was bought and the house built for a Mrs. Wallace, who subsequently became his wife just before his death. He gave this property to her and built the house for her. The title to the whole property was taken in her name. She was not his wife at the time of the conveyance. They were living together many years before they were married. He married her six weeks before he died.

Walter A. Gompertz testified (transcript, pages 47 and 50-56) in substance as follows: I know James Dunsmuir, the plaintiff in this action. I have had business connections with him. I was employed in the business here in San Francisco. I new Alexander Dunsmuir for about ten years. He was a resident of British Columbia at the time of his death. I know that because he told me so. He told me so in this way—that he wanted his name put in the directory as president of R. Dunsmuir's Sons Company of San Francisco, residing in Victoria, British Columbia. And his name was put in the directory in that way. I only remember having one conversation with him in regard to putting his name in the directory. I think the conversation was in the year 1896 at the time of the incorporation of the company. Before the incorporation the business was an unincorporated association conducted under the name of R. Dunsmuir & Sons. Alexander Dunsmuir's mother was the firm of R. Dunsmuir's & Sons. The parent business was in Victoria but was unincorporated. Alexander Dunsmuir and his brother made arrangements with

their mother whereby they incorporated the San Francisco business. The ancestral residence was in Victoria. He was not here in San Francisco most of the time. He was here off and on. He lived at the Pacific Union Club for awhile but he was in Victoria the greatest part of the time. He went east a good many times also. He was here for two or three months or six months and then he would go away. And he went to Europe for a year. He was very fond of hunting and fishing and would go away on those trips up north a great deal. Alexander Dunsmuir had very large interests in railways and coal mines in British Columbia. He was also interested in the R. Dunsmuir Sons Company of San Francisco. The nature of the business of that company was the handling of the products of the mines of the Wellington Colliery Company. The business here was merely a sales agency of the mines in British Columbia. All of Alexander Dunsmuir's property was in British Columbia. Alexander Dunsmuir told me when he spoke about putting his name in the directory that he was a British subject and resided at Victoria. I visited Alexander Dunsmuir at the places where he stopped here in San Francisco. That is the Pacific Union Club, the Grand Hotel and the Occidental Hotel. I think he had four rooms in the Grand Hotel. I do not know how many rooms he had at the Occidental, but he had more than one.

The directories of the City and County of San Francisco for the following years were admitted in evidence, which directories recite as follows:

The directories for the years 1882-1891, both inclusive, state the residence of Alexander Dunsmuir as being "Pacific Union Club, San Francisco."

The directory for the year 1892 states the residence of Alexander Dunsmuir as being "Victoria, British Columbia." The directories for the years 1894 and 1895 state the residence of Alexander Dunsmuir as being "Bohemia Club." The directory for the year 1896 states the residence of Alexander Dunsmuir as being "Victoria, British Columbia." The directories for each of the years 1897, 1898 and 1899 show the following entry: "Alexander Duns-
"muir, President R. Dunsmuir Sons Co., 340 Steu-
"art Street, R. Victoria, B. C."

Peter W. Bellingall testified (transcript, pages 75-78) in substance as follows: I knew Alexander Dunsmuir in his lifetime. I knew him when he came down from Victoria with his father as a boy. The first time he came on a visit. When he came down on business he came to supersede Mr. Berryman, who had been the agent for the Wellington coal. Alexander Dunsmuir told me that he was a subject of British Columbia, and that he was not a resident of San Francisco, but that he resided with his father in Victoria. His father was living I believe at that time. That was upwards of twenty years ago. In San Francisco Alexander Dunsmuir generally lived in hotels. He had a country place at San Leandro but I do not think he stayed there much. I live in Oakland and I think I met him on the boat only three or four times. He never could

go on bonds in connection with Custom House matters because he was a British subject.

William Greer Harrison testified (transcript, pages 82-85) in substance as follows: I have resided in San Francisco for about 39 years. I knew Alexander Dunsmuir in his lifetime and I knew him for about twenty years. He was representing here in San Francisco a coal firm, his people's firm. I have had frequent conversations with Alexander Dunsmuir in regard to his residence. In conversation he always referred to British Columbia as his home. He was always proud of being a British subject and did not care for American institutions. He would always insist that he would not give up his citizenship, that he was a Canadian and would remain a Canadian. My connections with Dunsmuir were business and social. I met him nearly every day. He belonged to the British Benevolent Society. The conversations I have mentioned were primarily directed at citizenship, the difference between British citizenship as compared with American. Although he was fond of California he did not like to live here and always insisted that he was here because he had to be here to represent his firm in British Columbia.

J. E. Freeman testified (transcript, pages 85-87) in substance as follows: I am an architect and have resided in San Francisco since 1887. I knew Alexander Dunsmuir and had business relations with him. I was employed by him in 1898 to build a residence for Mrs. Wallace, at San Leandro. In the course of my relations with him I had a conversation with

him in regard to his residence. In speaking about the different nationalities becoming American citizens I said that, among my business acquaintances a great many of whom were Englishmen, while they had business dealings in San Francisco and resided here they never became American citizens. During the course of that conversation he stated that he was an Englishman and his residence was in Victoria. He stated also that his home was Victoria. I called on him when he was living at the Grand Hotel. He had several rooms there. I do not know how much time each year he spent in San Francisco. I can only speak of the time I had business relations with him in the building of the house. He was living in the old house at San Leandro. The contracts for the construction of that house were made out in the name of Mrs. Wallace. He told me to make out the certificates in her name and that Dunsmuirs & Sons acting as her agents would pay the bills and they did so.

J. Homer Fritch testified (pages 88-92) in substance as follows: I have resided in San Francisco for 57 years. I knew Alexander Dunsmuir for 30 years and I had a great many dealings with him. His family and my family were very intimate. We had a great many conversations about American and Englishmen. According to his idea an American could not compare with an Englishman. He was essentially British. I remember once about his speaking of home, that was about 1895 or 1896. I had been up to Victoria with John Talbot on a hunting trip. The

following year Alexander Dunsmuir wanted me to join a party and go with him. He came to see me at the office and said "I am going up home on a "hunting and fishing trip. I want you to go, you "and Talbot." Always in conversation he spoke of Victoria as his home. He claimed that his home was with his mother in what was called the Dunsmuir Castle in Victoria. I met him also in Victoria on my way down from a hunting trip and he said "I want you to go out home and see mother and the family." The last conversation I had with Alexander Dunsmuir in which he referred to Victoria as his home was in 1895 or 1896 when he stated that he was going home to Victoria. I visited him at the Grand Hotel. He never referred to San Leandro as his home or to his rooms as his home. It is pretty hard to say how much time he spent each year in San Francisco. His main business was in Victoria. He was interested with his brother there and was an official in a number of companies there. He was either president or vice-president of the Esquimalt Railway in Victoria. The main business at Victoria was conducted under the name of R. Dunsmuir & Sons. The San Francisco business was conducted under the name of R. Dunsmuir Sons Company, a California corporation. His active interest was not here in San Francisco. Alexander Dunsmuir originally came down here to San Francisco about 1875 or 1876 to investigate the accounts of Mr. Berryman, who had the agency for the Dunsmuir coal. In about a year or so Berryman had to turn over the San Francisco business to the

Dunsmuirs. Alexander Dunsmuir came down and took charge of that. First he put a nephew of Mr. Berryman's in charge of the business here and later a man named Jewett. Alexander Dunsmuir was never what you would call an active member of the business here; he was a kind of an overseer. He kept largely between the two points, Victoria and San Francisco. **He stayed here a great deal of the time.**

Walter S. Thorne testified (transcript, pages 92-94) in substance as follows: I am a physician. I knew Alexander Dunsmuir slightly for three or four years and intimately for two years just prior to his death. I have had conversations with him respecting his residence in Victoria. The last incident of that sort that I recall was just prior to their removing to San Leandro, about a month prior to the completion of the house which was I think completed in December. 1899. I said to him, "Now you are going to have a " nice home over there why don't you become an Ameri- " can citizen, behave yourself like an American, you " are going to live here." He said, "You are quite " mistaken. I am not going to live here, this is not my " home and this house is not intended to be my home. " I am building this for Mrs. Wallace"—whom he had not married at that time. He said, "under no condition would I become an American." Upon further questioning him I learned that he had a provincial or national prejudice against American citizenship. We talked along these lines. He was very positive about it. He said, "My home and my people are in " Victoria and I don't purpose to live here and become

"a citizen." That conversation is very distinctly impressed upon my memory because of the coincident relation of that house building and my saying to him, "Well, now you are going to live here why don't you become an American citizen-" and his strenuous and positive denial of any such intention.

Thomas P. H. Whitelaw testified (transcript, pages 94-95) in substance as follows: I knew Alexander Dunsmuir. I have had business dealings with him. I have often been with him in Victoria, stopped with him at the Driard House, a hotel in Victoria. He always kept his rooms there when he was in San Francisco. I have seen him a great many times in Victoria. The last time was in 1887 or 1888. I visited his mother's house in Victoria. Four times I went with Mr. Dunsmuir to what was called the Dunsmuir Castle in Victoria. He had rooms at the Driard House in Victoria and also at his mother's house. He had two rooms at the Driard House. I visited him at the Occidental Hotel. He had two rooms there when in San Francisco. I don't think he kept his rooms here in San Francisco when he went to Victoria, but he always kept his rooms at the Driard House. He told me that himself. He spent more than three or four months of the year up in Victoria. He did not spend the greater part of each year in San Francisco. The greater part of his time was spent in British Columbia. I do not think he went hunting much.

W. E. Mighell testified (transcript, pages 95-98) in substance as follows: I knew Alexander Dunsmuir

intimately in his lifetime. I was partner with him in ships. I have had business relations with him. I had a conversation with him in regard to where his residence or home was. The conversation opened about his buying some stock in the California Shipping Company which I started and it drifted on to his residence and I asked him why he had not become naturalized. He said that there was nothing in it, that his residence was in British Columbia, all his interests were there, that he owned an interest in the Wellington Collieries, the Esquimalt Railway, and was interested in Victoria and on the Island of Vancouver. He said he represented the firm of R. Dunsmuir & Sons here in San Francisco. The last conversation I had with him in relation to his residence was the afternoon before he was married. We were on the Oakland Ferry, going from San Francisco to Oakland, and, if I remember right, there was an American ship flying an American ensign that we passed as we went over. I said "Alex, that is the flag you ought to live under," and he said "Oh, no; the flag I am under suits me, the English flag." "Well," I said, "why " don't you become naturalized, become an American? " Your business is here." "Well," he says, "Bill, there " is nothing to it; I would prefer to remain under the " English flag, where all my interests are." At that time he also mentioned that his residence was Victoria, British Columbia. I knew he lived there. I have visited him at his office there and have seen his brother there and his family. Mr. Dunsmuir did not take stock in this California Shipping Company. He gave

me as a reason for not doing so that he did not care to have anything that was under the American flag.

There was admitted in evidence a page from the register of the Hotel Imperial of New York, which page is set forth at pages 100-102 of the transcript. The following entry appears on said page of the register of the Hotel Imperial (transcript, page 101), which entry is in the handwriting of Alexander Dunsmuir, deceased: "Alex. Dunsmuir, wife & maid, Victoria, B. C."

TESTIMONY FOR DEFENDANT.

There was admitted in evidence the above mentioned Articles of Incorporation of R. Dunsmuir Sons Company (transcript, pages 104-109), which articles are dated February 27th, 1896, are signed and acknowledged by Alexander Dunsmuir, and recite (transcript, page 105) the residence of Alexander Dunsmuir as being "San Francisco, California."

There was admitted in evidence the above mentioned will of Alexander Dunsmuir (transcript, page 110), which will is dated December 21st, 1899, is signed by him and recites as follows: "I, Alexander Dunsmuir, " of San Francisco, California, United States of Amer- " ica, hereby revoke," etc.

There was admitted in evidence the marriage license of Alexander Dunsmuir and Josephine Wallace (transcript, page 113), which is dated December 19th, 1899, and recites that Alexander Dunsmuir is a resident of Alameda County.

Joseph Herrscher testified (transcript, pages 115-117) in substance as follows: I am in the general merchandise business in San Francisco and San Leandro. I knew Alexander Dunsmuir in his lifetime. I have talked with him about California at various times. He told me he was going to make his home in California; that he made his home there. He never dwelt upon San Francisco, only San Leandro. I recollect various conversations I had with him. I was city treasurer at that time and also a member of the board of education and he took quite a liking to me in talking matters over, and in delivering meats. He was a very peculiar man; he did not want everybody going in his premises and any orders given at the store at that time he wanted me to deliver them personally. At that time he spoke of making his home in California and liking the country here. He never told me where he had resided prior to going to San Leandro. He never went into any details about his whereabouts. He only conversed in reference to the climate and the country and the surroundings. He did not tell me he intended to make his home in San Leandro. He said he had made his home there, he was going to stay there, and that he liked it. I don't know that this property belonged to Mrs. Wallace; he always mentioned it as his. I do know that she had an interest in it. I do not know the details of the estate at all. I am just explaining to you what Mr. Dunsmuir told me himself. I did not know that this was not his home in the sense that it did not belong to him. He

never told me anything about that. I do not know when Mr. Dunsmuir was married, but it must have been in 1889. I could not say whether he told me this before or after he was married. I know the lady was living up there; I had conversations with her and she gave me orders. I called her Mrs. Dunsmuir. I cannot tell exactly the date or month when I first called her Mrs. Dunsmuir, but I know it was in 1889. I do not remember when they were married. I think they bought the place up there in 1889. I mean 1899, I made a mistake in the year. I don't think the house was completed during the time I saw him; I think it was in course of construction. I think he did live in that large house. I went there myself with the wagon. That was not after his death. I was there after he died, but I recollect the time he was living in the house. I cannot say whether or not he was living in the old house when the place was bought for Mrs. Wallace. I saw him in the new house several times. The first time I met him I drove up to the place to get orders and I met him at the gate. I asked him if he was Mr. Dunsmuir and he said yes. Then we talked over matters and got acquainted. He told me this was the only country he liked. He did not say he was going to make his home there. But he said "I have bought this place and this is my home." I don't know what brought out that conversation. I have no interest in this matter at all. I am here telling just what the man told me. I went up there once or twice a week for orders for groceries and general merchandise. He was not very pleasant

when I approached him first, but when we got acquainted and he knew my standing in the community we were friends. I do not remember when Alexander Dunsmuir was married. I knew, however, that he was married. He told me to see his wife about the orders. He told me that in 1899, about six or seven months before he died. I remember seeing an account of the marriage in the papers.

There was admitted in evidence an entry in the register of marriages of the Church of the Advent in Oakland, dated December 21st, 1899, as to the marriage of Alexander Dunsmuir and Josephine Wallace (transcript, pages 118-119), in which it is recited that the residence of each is San Leandro.

James P. Taylor testified (transcript, pages 119-122) in substance as follows:

I knew Alexander Dunsmuir in his lifetime. I was one of the witnesses at his marriage. I first became acquainted with him about 1877 or 1878. I had business relations with him here in San Francisco commencing in 1878. From that time my acquaintance with him was intimate. I called upon him at the Occidental and Grand Hotels and also at San Leandro. The place at San Leandro was bought in Mrs. Wallace's name. They lived over there before they built the new house. I don't think they ever lived in the new house. It was not completed. There were times when he was traveling in Europe and at other times I should say he lived here in San Francisco about three-quarters of the year. He went away on trips and on his trips north he would spend a good

deal of time hunting. At times he stated to me that his home was in Victoria. I do not remember at how late a date he said this. I do not recollect that he every said anything about intending to go to Victoria and stay there permanently. I should say that his active business interests were here in San Francisco, that is: those that he had to look after personally. He had a regular business manager here during all the time that he was here. The only way in which he spoke of San Leandro as his residence was when I used to come over to San Francisco and frequently go back on the boat with him and then take the train and sometimes go out to spend the evening and night with him, he would say in the office, "Well, James, let us go home." He said it in that colloquial or general way. After this invitation I would go with him to San Leandro. After he and Mrs. Wallace were married they only lived at San Leandro until the next day, when they left for New York. I may have testified before the British Consul on a commission issued by the Superior Court of the Province of British Columbia in the case of Hopper against Dunsmuir that Alexander Dunsmuir always told me that his residence was Victoria. I cannot recollect at this time. I made the affidavit upon which the marriage license of Alexander Dunsmuir and Mrs. Wallace was obtained. In that affidavit I stated that he was a native of British Columbia and a resident of Alameda County. Mr. Dunsmuir requested me to go and procure this marriage license for him, and told me to take such steps as were necessary to secure the

license. In that connection I took it that he was a resident of San Leandro. I do not remember now whether he gave me any special authorization on that point or instructions on that matter. I cannot say, so far as my memory goes, that I had any special instructions to put in the affidavit that his residence was Alameda County. I do not know that I knew at that time that he regarded Victoria as his home.

Obadiah Rich testified (transcript, page 122) in substance as follows: During the years 1885 to 1890 I was manager of the Grand Hotel. Alexander Dunsmuir lived there part of that time. He was there from time to time but did not keep his rooms there permanently. He had three rooms.

P. M. Nevin testified (transcript, pages 122-124) in substance as follows: I knew Alexander Dunsmuir. I knew him in San Francisco and San Leandro. I was employed by him in both places. I went to work for him in San Francisco in 1893 as a teamster in the business. The only place I ever knew of him living at was the Occidental. I heard he was living there. I knew he was at the Grand. I did not take particular notice as to how much time of each year he would spend at San Francisco. Every once in a while I would see him and then he would go away and then I would not see him for two or three months or six months. I worked at the place at San Leandro. I worked there first in the capacity of coachman. I went over there on March 12th, 1899, and I stayed there through his lifetime. I never heard him make any statement as to where his home

was. I never heard him speak of San Leandro as his home, except that when I would take him to the train he would tell me he would be home on such and such a train, telling me what train he would be home on. I remember when he married Mrs. Wallace. He never lived at the new house. I was there all the time while the house was being constructed. The new house was not completed when they were married. It was not fit for occupancy until after Mrs. Dunsmuir came home. The next day after their marriage they went to New York. They did not come back to San Leandro at all after they were married. They remained in Oakland that night and went to New York the next day, I understand.

The foregoing is, we believe, a fair summary of the evidence as to the domicile of Alexander Dunsmuir, deceased. And where, we ask, is there any substantial evidence that said deceased changed his domicile from British Columbia or that he was ever domiciled in the State of California? It is respectfully submitted that there is none and that the judgment in favor of the defendant is erroneous and must be reversed. We believe that the mistake in giving judgment in favor of the defendant instead of the plaintiff arose by reason of the fact that the case was treated as if the plaintiff were attempting to establish for Alexander Dunsmuir a new domicile in British Columbia different from one that he had previously had in California. If such were the case, it might properly be said that we had failed to show such new domicile. But such is not the case.

As above stated, it is conceded at the outset that Alexander Dunsmuir, deceased, was born in British Columbia, and was at all times a British subject and was at all times, except at the time of his death, domiciled in British Columbia. We have, therefore, a domicile already established. Not California, however, but British Columbia. The defendant, asserting that the domicile at the time of death was California, must show the change of domicile. This he has signally failed to do.

The evidence shows that Alexander Dunsmuir originally came down from Victoria, British Columbia, to San Francisco, California, to investigate the accounts of the San Francisco agent of his father's coal business, which was in British Columbia. Later he came to San Francisco to take charge of the business, which was a mere selling agency. The evidence shows also that he had large property interests all of which were in British Columbia. He always insisted that British citizenship was far superior to American and that he would never become an American citizen. He always stated that his residence was Victoria, British Columbia. He never claimed that his residence was in California. He referred to Victoria as his home. He was in San Francisco merely to look after the business here. He had rooms in his mother's house in Victoria and also had rooms in the Driard House in Victoria, which rooms he kept even when he was here in San Francisco. Although he spent considerable of his time in San Francisco he spent considerable of his time in Victoria also, keeping largely

between the two places, except when he was traveling in Europe or elsewhere. The city directories of San Francisco, California, for the years 1896, 1897, 1898 and 1899, the last four years of his life, show his residence as being Victoria, British Columbia. About the year 1896 when the R. Dunsmuir's Sons Company was incorporated he instructed one of his employees, Mr. Walter A. Gompertz, to have his name put in the directory as president of said company and as residing at Victoria. And, finally, we have the entry "Alex. Dunsmuir, wife & maid, Victoria, B. C.," made by Alexander Dunsmuir in the register of the Hotel Imperial, New York, on December 26th, 1899 (one month and five days prior to his death), which entry is the last declaration by him as to his domicile and is in fact the only written declaration in his own handwriting in the record. This entry, without the other evidence in the record, shows conclusively that Alexander Dunsmuir never claimed domicile or residence in California, but intended to retain his domicile in British Columbia. As he had no intention of making his domicile in California, his domicile was not changed from British Columbia to California by reason of the fact that he was here a considerable portion of the time. (See the above quotations from Cyc. and Jacobs' Law of Domicil, and the above mentioned case of *Hascall* vs. *Hafford,* 107 Tenn. 355, 89 Am. St. Rep. 952.)

Of course, there is the recital in the Articles of Incorporation that Alexander Dunsmuir resided at San Francisco, California, and the recital in the will,

"I, Alexander Dunsmuir of San Francisco, California," but these recitals are entitled to no weight whatever in our case for a number of reasons. In the first place neither of these documents is shown to be in the handwriting of Alexander Dunsmuir, he merely having signed them, while the above mentioned entry in the register of the Hotel Imperial made at a later date, is entirely in his own handwriting. Furthermore, there was no evidence that these recitals in the will and articles of incorporation were ever called to his attention. These documents were undoubtedly prepared by a lawyer, and he, as a person would do under similar circumstances, described Alexander Dunsmuir as being of San Francisco, California, the place where he was at the time the same were executed. There is no testimony to the effect that Alexander Dunsmuir ever told the attorney who drew the will that he resided in San Francisco and there is no evidence that he ever told the attorney who drew the Articles of Incorporation that his residence was San Francisco. In addition, the words in the will "of San Francisco, California," are not the equivalent of a statement that that city was the place of residence of Alexander Dunsmuir. The San Francisco directory for the year 1896, the year in which the Articles of Incorporation were executed, recites that Alexander Dunsmuir's residence was Victoria, British Columbia, as do the subsequent directories during his lifetime. If the facts in this case were quite evenly balanced as to whether Alexander Dunsmuir was a resident of British Columbia

or of San Francisco these recitals in the will and Articles of Incorporation might have considerable weight, but, where the remaining evidence is all one way, that is: that the domicile of Alexander Dunsmuir was in British Columbia, these recitals are entitled to no weight whatsoever.

See Section 463 of Jacobs' Law of Domicil, which reads as follows:

> "But although such recitals (referring to the recitals of residence in deeds and wills) are important either when standing by themselves or when corroborating other evidence, particularly in a nicely balanced case, they are by no means controlling when contradicted by other facts and circumstances.
>
> "They are frequently made in both deeds and wills without any special importance being attached to them; and sometimes are introduced by scriveners without the attention of the grantor or testator being particularly called to them. Great caution should therefore be used against giving them too great weight, or attaching to them a meaning which was not intended. Said Surrogate Bradford, in a learned opinion in *Isham* v. *Gibbons* (1 Bradf. 69): 'The declarations of the deceased in his will and in the deed of manumission furnish the only evidence pointing to the acquisition of a new domicil. In a nicely balanced case they might be decisive; but great caution should be used in not giving them to great weight, or attaching to them a meaning not designed by the testator. * * * The truth is, after all, that such written declarations, even of the most solemn character, are but facts

> to enable the court to discover the intention of the party. It is in this light alone that they are to be received and weighed. At the best, the *animus* of the party is only to be inferred from them. In this respect they are like any other facts. Declarations of any kind are not controlling, but may be, and frequently are, overcome by other and more reliable indications of the true intention.'"

Furthermore, this recital in the will cannot be used to show that Alexander Dunsmuir was domiciled in California as the finding in said decree of distribution is directly to the contrary. The will being under the law merged in the decree the recitals in the decree control the recitals in the will. See the following cases:

> *Goad* vs. *Montgomery,* 119 Cal. 558;
> *Estate of Trescony,* 119 Cal. 568;
> *Estate of Larned,* 156 Cal. 309;
> *Jewell* vs. *Pierce,* 120 Cal. 79.

We also have the marriage license and the entry in the church register, both of which were objected to by us and neither of which should have been admitted by the Court as James P. Taylor, witness for defendant, testified that he made the affidavit upon which the marriage license was issued and that he had no instructions from Alexander Dunsmuir to state that his residence was Alameda County or any instructions whatsoever in regard to his residence, and, as the entry in the church registry was not a public record and furthermore it was not shown that

the person making the entry had any knowledge of the facts therein stated. They were undoubtedly taken from the marriage license. The statement in the marriage entry was hearsay pure and simple.

In addition, we have the testimony of the witnesses Joseph Herrscher, James P. Taylor, Obadiah Rich and P. M. Nevin, which, with the will, articles of incorporation, marriage license and church registry, completes the defendant's evidence. Rich simply testified that during part of the time between the years 1885 to 1890 Alexander Dunsmuir lived at the Grand Hotel but that he did not keep his rooms there permanently. Nevin, who was a coachman for Alexander Dunsmuir at San Leandro, testified that he never heard him speak of San Leandro as his home, except that when Nevin drove him to the station in the morning Alexander Dunsmuir would tell him what train he would be home on. Nevin also testified that he worked for Alexander Dunsmuir as a teamster in the San Francisco business. He did not know how much of each year Alexander Dunsmuir spent in San Francisco, except that he would see him every once in a while and then Dunsmuir would go away and he would not see him for two or three or six months. Taylor testified that Alexander Dunsmuir at times referred to his home as Victoria but Taylor did not claim that he had ever referred to San Francisco as his home. Taylor further testified that Dunsmuir never referred to San Leandro as his residence except that sometimes in the office when Dunsmuir would invite him out to San Leandro to

spend the night he would say: "Well, James, let us go home." Herrscher did testify that Alexander Dunsmuir told him that he made his home in California; also that he made his home in San Leandro. That he was going to stay there and that he liked it. Very little faith, however, can be put in this testimony. Herrscher, in common with the rest of defendant's witnesses, except Taylor, was not a personal friend of Alexander Dunsmuir, while nearly all of the plaintiff's witnesses were. Herrscher was a tradesman, and a very conceited one, as his testimony shows, who took and delivered orders at the San Leandro house. It seems unnatural that Alexander Dunsmuir should discuss his personal affairs with a tradesman, whom he had only met in the way of trade. Especially so that he should, the first time the man came to the house, say to him: "I have bought this place and this is my home." These statements of Alexander Dunsmuir, testified to by Herrscher, if they are to be considered as declarations by him that his residence or domicile was in San Leandro, are little short of remarkable as they are exactly contrary to the statements made by him to his personal friends. One, for example, being the statement made to Dr. Thorne about two months before he died that the San Leandro place was not his home and that he was building it for Mrs. Wallace, whom he had not married at that time. But these statements were not, and undoubtedly were not intended by Alexander Dunsmuir, to be declarations as to his place of domicile or residence. It is appar-

rent from Herrscher's testimony that he and Alexander Dunsmuir were not discussing the latter's domicile or place of residence. He was not discussing, and it was not likely that he would discuss, his personal affairs with Herrscher. Herrscher, himself, says that Dunsmuir did not tell him where he had formerly resided or go into any details as to his former whereabouts. They only conversed in reference to the climate, the country and the surroundings. If Dunsmuir made the statements attributed to him by Herrscher, they were probably made in answer to inquiries of Herrscher. It is not likely that Dunsmuir would say to Herrscher, as he did to his personal friends, that he was an Englishman and was here only to look after the San Francisco agency of his firm's coal business, and, while he was then living in San Leandro, Victoria was his residence. It was sufficient for him to say to Herrscher, his tradesman, that he liked San Leandro and it was his home. There was no occasion for him to say that he intended to return to Victoria, no matter how strong that intention was. It is apparent, therefore, that Herrscher's testimony even if it were true can have no weight in determining the domicile of Alexander Dunsmuir. But it is inherently improbable and there are certain discrepancies in it which make it difficult of belief. Herrscher says Alexander Dunsmuir and Mrs. Wallace lived in the new house when the testimony is clear to the effect that they did not do so, as the new house was not completed at the time of the marriage, Nevin, the coachman, testifying that

they went to Oakland after the wedding and did not return at all to San Leandro. Herrscher further says that he began calling Mrs. Wallace "Mrs. Dunsmuir" during Alexander Dunsmuir's lifetime, which was impossible as they did not, as above stated, return to San Leandro after the marriage. But in any event, the statements made by Alexander Dunsmuir to Herrscher, as well as the statements made to Taylor and Nevin, that he would be home on such and such a train and "Let us go home," are, in view of the other evidence in the case, entitled to no weight on the question of domicile. See Section 71 of Jacobs' Law of Domicil, reading as follows:

> "There are several objections, however to affirming the entire and universal equivalency of 'domicil' and 'home': First: Because, while the former is a word of at least approximately precise meaning, the latter is used in various significations; for example, (a) with reference to a temporary abiding-place, as when one speaks of 'going home' to his lodgings—and this certainly is not domicil."

After this review of the evidence we believe this Court will unqualifiedly agree with us that there is no evidence to justify the District Court in its conclusion that Alexander Dunsmuir was not domiciled in British Columbia at the time of his death. His domicile was originally there, he was only here temporarily as he himself on numerous occasions declared, he always declared that his residence was in Victoria, he never declared his intention of changing

his domicile from British Columbia to the State of California, or anywhere else, he never did anything to show that he intended making a change of domicile, and, finally, he declared in a statement in writing, to-wit: the entry on the register of the Hotel Imperial, about a month before his death, that his domicile was still in British Columbia.

We might not be justified in an ordinary case, where the evidence is more or less conflicting, to ask this court to review the evidence where there are no findings, even though without findings it be known exactly what the trial Court had found, yet we feel that in this case, where there is really no substantial evidence to justify the finding of the trial Court that Alexander Dunsmuir was not domiciled in British Columbia and where it would, we respectfully submit, be unjust to affirm the judgment of the trial court, and where findings are not necessary to know exactly what the trial court found, this Court should examine the evidence.

THIRD POINT.

The trial Court could not find that the legacy to James Dunsmuir had a taxable value. The evidence on this question consists of the agreement dated December 1st, 1900, between James Dunsmuir, the brother of Alexander Dunsmuir and plaintiff in this action, and Josephine Dunsmuir, the widow of Alexander Dunsmuir (pages 78-82 of the transcript), the above mentioned recitals in said decree of distribution

(transcript, pages 37-38), and the testimony of Albert W. Mowbray (transcript, pages 45-46).

Said agreement reads as follows:

> This agreement made and entered into this first day of December, A. D. 1900, by and between James Dunsmuir, of Victoria, B. C., brother of Alexander Dunsmuir, deceased, the party of the first part, and Josephine Dunsmuir, of San Leandro, Alameda County, California, widow of the said Alexander Dunsmuir, deceased, the party of the second part.
>
> WITNESSETH:
>
> WHEREAS, said Alexander Dunsmuir departed this life in the city of New York, State of New York, on the 31st day of January, 1900, leaving surviving him a widow, the said Josephine Dunsmuir, party of the second part hereto, but no children; and
>
> WHEREAS, said Alexander Dunsmuir left a last will and testament dated December 21st, 1899, by which he devised and bequeathed all of his property to his brother the said James Dunsmuir in form absolute, but in fact according to the previous understanding and agreement between the said James Dunsmuir and said Alexander Dunsmuir in his lifetime, partly in trust for the benefit of said Josephine Dunsmuir, widow, as aforesaid, and
>
> WHEREAS, said Alexander Dunsmuir left property, both real and personal, situate in the Province of British Columbia and in the State of California; and
>
> WHEREAS, said last will and testament was

admitted to probate in the Supreme Court of British Columbia on the 26th day of February, 1900, and all of the estate of the said deceased, both real and personal, situate in British Columbia, was thereafter by decree of the said Court distributed to said James Dunsmuir, pursuant to the terms of said last will and testament; and

WHEREAS, an authenticated copy of said last will and testament was thereafter, to wit, on the 9th day of May, 1900, admitted to probate in the Superior Court of the State of California, in and for the City and County of San Francisco, in which jurisdiction a portion of the property belonging to said decedent is situate, which ancillary administration is still pending in said last named Court; and

WHEREAS, since the death of said Alexander Dunsmuir the said James Dunsmuir, in accordance with said previous understanding and agreement between said James Dunsmuir and said Alexander Dunsmuir in his lifetime, has from time to time made suitable provisions for said Josephine Dunsmuir, widow of the said brother as aforesaid; and

WHEREAS, in consideration of the premises, the parties hereto are mutually desirous of coming to an understanding and agreement concerning said trust hereinabove referred to;

NOW, THEREFORE, this agreement witnesseth, that said James Dunsmuir, in consideration of the premises, does hereby covenant, promise and agree to and with the said Josephine Dunsmuir to pay her for and during the term of her natural life, the sum of Twenty five thousand (25,000) Dollars per annum, in gold coin

of the United States of America, payable in equal monthly installments, in the said city and county of San Francisco, commencing from the date of the death of said Alexander Dunsmuir; and also and in addition thereto the full one half of the net income arising from any and all property both real and personal, left by said Alexander Dunsmuir in the State of California, which said James Dunsmuir shall or has received from the estate of said Alexander Dunsmuir, deceased, but only after the R. Dunsmuir's Sons Company a corporation shall have paid to R. Dunsmuir Company, a corporation under the laws of British Columbia the present existing indebtedness due from it to the latter corporation, all payments on account of such income to be made monthly it being understood and agreed that the said annual payments of twenty five thousand (25,000) dollars and all payments on account of such income shall cease and determine upon the death of the said Josephine Dunsmuir, widow, as aforesaid;

And in consideration of the said payments already made and to be made as hereinabove set forth, the said Josephine Dunsmuir, widow, as aforesaid, does hereby expressly waive, relinquish and renounce, as heir at law and widow of Alexander Dunsmuir, deceased, for herself, heirs, administrators and assigns, all right, claim and interest in and to any and all of the property left by the said Alexander Dunsmuir both real and personal and wheresoever situate, and in and to all family allowance arising either under the laws of the Province of British Columbia or under the laws of the State of California;

This agreement shall and is hereby declared to be binding and obligatory on the heirs, executors, administrators and assigns of both parties hereto.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first herein above written.

IN DUPLICATE.

Signed JAMES DUNSMUIR (seal)
Signed JOSEPHINE DUNSMUIR (seal)

Witness:

RUSSELL J. WILSON
M. S. WILSON

Duly acknowledged before James Mason, Notary Public in and for the City and County of San Francisco, State of California, as to the signatures of both James Dunsmuir and Josephine Dunsmuir."

Said recitals of the decree of distribution read as follows:

"And it appearing that said Alexander Dunsmuir devised and bequeathed all of his property to his brother, James Dunsmuir, but according to previous understanding and agreement said James Dunsmuir, was to make suitable provision for said Josephine Dunsmuir, widow as aforesaid, during her life;

"And it appearing that the said James Dunsmuir has since the death of said Alexander Dunsmuir in furtherance of said previous understanding and agreement entered into an agreement with the said Josephine Dunsmuir, in full settlement of her claims as widow upon the estate of said decedent, whereby he has bound himself to pay her an annuity during her lifetime.

"And it appearing by the report of the Hon. Finlay Cook, the appraiser appointed by this Court to appraise all interests in this estate subject to the collateral inheritance tax, that the present cash value of the annuity for the benefit of the said Josephine Dunsmuir, widow, as aforesaid, is in excess of the value of the property passing to James Dunsmuir, and that therefore, the property passing to said James Dunsmuir is not subject to the payment of any collateral inheritance tax."

The testimony of said Albert W. Mowbray reads as follows:

I am a consulting actuary.

Mr. Thorne (counsel for plaintiff): Q. Assuming a person to be 49 years and one month on the 31st day of January, 1900, what would be the present value of an annuity of $25,000 per year, payable in monthly installments during the life of that annuity?

The Court: During her expectancy?

Mr. Thorne: Yes, sir.

A. Assuming that mortality follows the combined experience table of mortality, which is the table provided by the law of the State of California for inheritance tax appraisals, and the rate of interest was in that statute 5 per cent, the present value of an annuity $25,000 per annum, payable monthly, the first payment immediately, during the continuance of the life of a party aged 49 years, nearest birthday, would be $302,607.50.

Mr. Thorne: Q. What table did you refer to?

A. The combined or Actuaries Experience Table of Mortality, and 5 per cent interest, which

is the basis prescribed by the inheritance tax law of the State of California. An annuity for $25,000.00 payable monthly to a party aged 49 years, nearest birthday, according to the Combined Experience Table of Mortality, 6 per cent interest, the present value would be $277,422.50. The same annuity, the same mortality experience, but a 7 per cent interest rate, the present value would be $255,685.

On cross-examination the witness testified as follows:

Mr. Pier: Q. What is the usual rate of interest used by insurance companies in calculating annuities?

A. They usually use not higher than 3½ per cent. I think generally 3 per cent. They also use a table which shows a very much longer life than the Actuaries Experience Table because their experience with the annuities is that the class of people generally who take annuities are long lived people; and they also take a low rate of interest because they want a rate of interest low enough so that they will not fail in carrying out their contracts.

Q. Why should they use such a low percentage as 3 per cent?

A. Insurance companies have to sustain the test of the various states for solvency, for one thing, the highest rate I know of that is allowed in a test of solvency is 3½ per cent. The annuity business, due to the particularly long life of annuities has generally been at least not a profitable business and the lower the rate of interest the

> higher the value of the annuities, so they want to increase their charges for annuities. A great many of the annuities in American companies are sold in Europe where the returns on investments are low and the rate they have to compete with corresponds.

It appears from the testimony of Mr. Mowbray that the value of the annuity made by James Dunsmuir to Josephine Dunsmuir was greater than the clear value of the estate received by James Dunsmuir upon distribution. He made the computation by virtue of the mortality tables, which the Supreme Court of the United States has held may be resorted to for the ascertainment of annuities.

> *Vanderbilt* vs. *Eidman,* 196 U. S. 496 (quoting from *Matter of Hoffman,* 143 N. Y. 327).

And the tax provided for by the War Revenue Act is only imposable on the clear value of the legacy. See

> *Billings* vs. *People,* 189 Ill. 472, 478, (cited and quoted with approval in *Vanderbilt* vs. *Eidman,* 196 U. S. 496).

The agreement between James Dunsmuir and Josephine Dunsmuir and the recitals in the decree of distribution show, although the matter is not mentioned in the will of Alexander Dunsmuir, deceased, that it was agreed between Alexander Dunsmuir and James Dunsmuir that he was to provide for her

out of Alexander Dunsmuir's property in the manner in which she has been provided for under the terms of said agreement. Such arrangement must, therefore, be held to be the manner in which the property of Alexander Dunsmuir, deceased, was really distributed, that is: it must be held to supersede his will, as was held to be the case in *McCoy* vs. *Gill,* 156 Fed. Rep. 985, from which we have above extensively quoted. In that case, as the Court will recollect, the contest of a will was compromised and the property distributed in accordance with the compromise which was different from the disposition of the property made by the will. The Circuit Court of the United States held that this compromise superseded the will and must be looked to for the collection of the legacy tax. Is that not really the situation in our case? In the case at bar the facts are very much stronger against the will being controlling, because therein the arrangement (not the actual execution of the agreement) for the annuity was made prior to Alexander Dunsmuir's death. Therefore this arrangement became a part of his will and the disposition made of his property by his will, as modified by this arrangement, was really the disposition made by him of his property. This arrangement being binding on James Dunsmuir, had to be recognized by the probate court and must be recognized by everybody else, including the United States. The probate court did recognize it and the decree of distribution in effect makes distribution to James Dunsmuir subject to the annuity. It further finds that by reason thereof the legacy had

no clear value. These determinations must be binding upon the United States, since it must, as was said in the last mentioned case of *McCoy* vs. *Gill,* look to the decree of distribution for a determination as to whom and in what manner the property of a decedent goes. The decree of distribution supersedes the will and the United States can only tax the plaintiff upon the property that was distributed to him, that is: a legacy subject to an annuity greater in value than the value of the legacy. It is true that the decree does not find the exact value of the annuity, simply finding that it is of greater value than the legacy, but the testimony of Mr. Mowbray shows its exact value, which was considerably greater than the value of the legacy.

We have considered this matter as if the arrangement for the annuity was in effect a part of the will, but, even if it were not, it certainly was a settlement and compromise of the claims of Josephine Dunsmuir to the estate of Alexander Dunsmuir, deceased (as she in the agreement, transcript, page 81, in consideration of the annuity, waives all her claims to the estate), and would, therefore, come squarely within the ruling of the United States Circuit Court in said last mentioned case of *McCoy* vs. *Gill* to the effect that the disposition of the property on the compromise and not the disposition made by the will controls. See also the following cases holding that, where parties compromise their various claims to an estate, moneys paid in good faith in compromise of claims or threatened litigation or of a will contest are not subject to a legacy tax:

Estate of Hawley, 214 Pa. St. 525;
Estate of Pepper, 159 Pa. 508;
Estate of Kerr, 159 Pa. St. 512;
Estate of Wells, (Iowa), 120 N. W. Rep. 713;
English vs. *Crenshaw,* 120 Tenn. 531;
Estate of Cook, 187 N. Y. 253;
Appeal of Commonwealth, 34 Pa. St. 204;
Page vs. *Rives,* 1 Hughes, 297, Fed. Cas. No. 10666.

The legacy to James Dunsmuir having no taxable value, the tax collected thereon by defendant must be refunded.

It is not necessary to discuss the above mentioned specifications of error since they are, as above stated, all based upon the proposition that the decree of distribution is conclusive. If this Court holds it to be conclusive the rulings complained of are all erroneous. The marriage license and marriage registry are also objected to as not being based on statements of Alexander Dunsmuir and as being mere hearsay.

It is respectfully submitted that the judgment should be reversed.

ANDREW THORNE and
WALTON C. WEBB,

Attorneys for Plaintiff in Error.

No. 2386.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES DUNSMUIR,
Plaintiff in Error,
vs.
JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of August E. Muenter, Collector of Internal Revenue),
Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR.

The points raised by the writ of error in this case may be generally classified in two subdivisions:

First: Was the evidence before the trial court sufficient to sustain the judgment?

Second: Did the trial court commit error in admitting the evidence excepted to in plaintiff's assignments of error numbers I, II, III and IV?

We submit that the first point is not properly before this court for the following reasons:

Section 649 of the Revised Statutes of the United States provides that

> "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700 of the Revised Statutes of the United States provides further

> "When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

In this case the record shows that the judgment was general for the defendant, and that there were no special findings.

Counsel for plaintiff is in error when he says the rule has been adopted that where there are no findings, the question of insufficiency of the evidence to support the judgment cannot be raised. The court, by its judgment for the defendant, made a general finding, and the true rule is that "the finding of the "court, if general, cannot be reviewed in this court "by a bill of exceptions, or in any other manner." This rule is laid down in the following cases:

Miller vs. *Ins. Co.,* 12 Wall. 298, 79 U. S. XX 400;
Ins. Co. vs. *Folsom,* 18 Wall. 237, 85 U. S. XXI 827;
Cooper vs. *Omohundro,* 19 Wall. 65, 86 U. S. XXII 47;
Town of Martinton vs. *Fairbanks,* 112 U. S. XVIII 863;
Town of Santa Ana vs. *Frank,* 113 U. S. XXVIII 979;
Morris vs. *Shriner,* 131 U. S. Appx. XCI, 9 L. Ed. 303;
Betts vs. *Mugridge,* 98 U. S. 644, 25 L. Ed. 157.

Even if this were a case where the sufficiency of the evidence could be considered, the bill of exceptions does not appear to be a complete record of all the evidence taken. On page 32 of the Transcript, there is the statement: "At the trial of said cause, the following proceedings were had", but it does not appear that the proceedings recited therein were all the proceedings had. Such a bill is sufficient for a review of the exceptions to the admission of evidence specially appearing therein, but not for a review for the purpose of determining the sufficiency of the evidence.

The case of *Knowlton* vs. *Culver,* a Wisconsin case reported in 52 American Decisions, 156, at page 159, lays down the true rule that

> "Where, however, there is a controversy as to the weight, effect, or admissibility of evidence, the bill should set forth the evidence given or offered at length, and should aver that it was all the evi-

dence given or offered at the trial, or on the point in question."

This disposes of the points raised in the first subdivision above referred to, which are designated as the second and third points in the brief of plaintiff in error, and set forth at pages 5 and 6 thereof, with regard to the sufficiency of the evidence. They cannot in any way be considered in this court.

The only matter properly here for consideration is whether or not the decree of distribution made by the Superior Court of the City and County of San Francisco is conclusive against the defendant on the matter of domicile and residence so as to preclude the introduction of the documentary evidence designated as defendant's exhibits A, B and C, and the testimony as to the entry in the Register of Marriages of the Church of the Advent, in Oakland, California.

THE DECREE OF DISTRIBUTION IS NOT A JUDGMENT WHICH IS BINDING UPON THE DEFENDANT AS TO RESIDENCE AND DOMICILE.

The finding in the decree of distribution (Tr., p. 34) that Alexander Dunsmuir was "a resident of, and domiciled at Victoria", is not a necessary finding for the purpose of such decree for the reason that the probate proceedings in California were based upon the fact that property of the decedent was in the City and County of San Francisco, and not upon the fact of the residence or domicile of the decedent. Nor was it necessary for the probate court to make a

finding as to residence for the purpose of assessing the state inheritance tax. That matter also rests on the location of the property.

There is no principle of law or rule of logic which makes a finding of an immaterial fact by a court in an *ex parte* proceeding conclusive as to the rights of a person not a party to the action.

The case of *Nicholls* vs. *United States,* 7 Wall. 122, lays down the principle that "every government has " the inherent right to protect itself against suits, and " if in the liberality of legislation they are permitted, " it is only on such terms and conditions as are desig- " nated by statute."

In the case of *Jesse D. Carr* vs. *United States,* 98 U. S. 432, where the government brought an action to acquire title to certain lands in the City of San Francisco, and where in answer by way of estoppel the defendants sought to have certain judgments in ejectment rendered by the state courts against certain officers of the government who as its agents had possession of the lots in question, it was held:

> "That the United States cannot be estopped by proceedings against its tenants or agents and cannot be sued without its consent and such consent can only be given by an act of Congress; that without an act of Congress no direct proceedings will lie at the suit of an individual against the United States or its property; and no officer of the government can waive its privilege in this respect nor lawfully consent that such a suit may be presecuted so as to bind the government. The government can only hold possession of its property by means of its officers or agents and to allow them to be dispossessed by suit

> would enable parties always to compel the government to come into court and litigate its rights. Therefore when it becomes apparent by the pleadings or the proofs that the possession assailed is the possession of the government by its agents, the jurisdiction of the court ought to cease and its proceedings cannot be set up as an estoppel against the government."

In the case of *Siren* vs. *United States,* 7 Wall. 152, it was held:

> "A claim for the damages occasioned by collision of vessels at sea may be enforced in admiralty by a proceeding *in rem,* except where the vessel doing the damage is the property of the United States."
>
> "In such case the claim exists equally as if the vessel belonged to a private citizen but it cannot be enforced against the government without its consent."

It is argued that a probate proceeding is a proceeding *in rem.* If, however, a proceeding *in rem* cannot be brought against the government without its consent, it logically follows that the government is not bound by a decree in a proceeding *in rem* which has been brought without its consent.

In view of this rule, it cannot be successfully urged that the government should be foreclosed of its rights by a decree in an action which is outside any statutory permission as to itself, and to which it is not a party.

The United States has, in the Act creating the legacy tax and also in the general laws relating to internal revenue, prescribed the mode and method

by which this tax shall be collected, and only determinations made by tribunals prescribed by those various Acts of Congress are binding in any way upon the United States. The United States has not consented that the question of domicile or any other facts should be determined by the probate courts of the various states. The sole effect of a decree of distribution as far as the collection of the legacy tax is concerned, is that it is an operative instrument of transfer to determine what property under its terms passed from the decedent to the beneficiaries.

In considering the decree in this connection, only the operative words are to be considered and not the words of recital or the findings of numerous other facts which may or may not be necessary for the determination of various questions in the probate proceedings.

In short, the decree of distribution is to be considered in much the same light as a deed. The important words are the names of the parties, the words of transfer, and a description of the property transferred.

It follows from the foregoing, that the trial court committed no error in admitting in evidence over the plaintiff's objection, the will of Alexander Dunsmuir, and the Articles of Incorporation of R. Dunsmuir's Sons Co. referred to in exceptions I and II respectively.

The marriage license, the admission of which in evidence is attacked by exception III, was acted upon and actually used by Alexander Dunsmuir for the

purpose of his marriage and it must be considered that he approved and ratified the recitals therein, thereby making them his own.

> "A certificate of marriage, however (in the strict sense), may nevertheless sometimes be available, not under the present hearsay exception, but by virtue of other rules of evidence. (1) If it has been signed or used by the adverse party, it may be receivable against him as an admission."
>
> Wigmore on Evidence, par. 1645 at p. 2013.

The fourth exception is to the ruling of the court in admitting evidence of an entry in the Register of Marriages of the Church of the Advent in Oakland, which entry is set forth at page 118 of the Transcript. The entry appears to be one made in a public record in the regular course of business. There was no attempt to show anything to the contrary. It is therefore clearly admissible under the well recognized rules of evidence.

> Jones on Evidence, 2d Ed., par. 511.
> *Evanston* vs. *Gunn,* 99 U. S. 660.
> *Lewis* vs. *Marshall,* 5 Peters, 470 to 476.
> *Hunt* vs. *Order of Chosen Friends,* 8 Am. State Rep. 855 to 857.

If the matter were properly before the court, a cursory examination would show the evidence to be amply sufficient. The burden is on the plaintiff to establish residence out of the State of California. The written declaration of the deceased in his letter and in the Articles of Incorporation are alone suf-

ficient to negative any such contention, but the sufficiency of the evidence is not before this court, the only matter for review here being the admissibility of certain evidence hereinabove particularly designated.

We respectfully submit that the judgment of the trial court should be affirmed.

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M. A. THOMAS,
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